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FEDERAL COMMUNICATIONS COMMISSION REPORTS
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VOLUME 40 (2d Series)

Pages 1 to 102

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 73-249

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
PETITION OF AIR FRANCE FOR WAIVER OF PROVISIONS OF SECTION 303(1) OF ACT, AND SECTIONS 13.4(c) AND 13.11(c) OF RULES.

ORDER

(Adopted March 7, 1973; Released March 12, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. Air France is leasing three U.S. registered Boeing 747 Aircraft, Registration Nos. N-28888, N-28899 and N-28903, from U.S. corporations. It proposes to operate the aircraft with Air France pilots and flight engineers. In order to allow the Air France pilots to act as Radiotelephone Operators on aircraft of U.S. registry inside and outside the United States, Air France has requested the citizenship requirements of Section 303(1) of the Act be waived. The applicants appear to be eligible for a waiver of the U.S. nationality requirements. The Commission is of the view that a grant of such request would be in the public interest.

2. Section 13.4(c) of the Commission's Rules imposes a geographical restriction on a permit issued to an alien making that permit valid only while the operator is in the United States. Since the pilots of AIR FRANCE will also be operating aircraft outside the United States, the geographical restriction would render the permits useless outside of the United States unless the restriction were waived. It appears that the public interest would be served by the requisite waiver.

3. Air France seeks further a waiver of the provisions of Section 13.11 of the Rules, and requests that its collective application dated February 23, 1973, listing 56 named airline transport pilots and 55 named commercial pilots and signed in the name of Compagnie Nationale AIR FRANCE by Andre Cabanes, Administrative and Financial Services Manager of the North and Central American Division of Air France, rather than by each of the individuals listed, together with the appropriate fee for each of the 111 individuals, be accepted. Air France has agreed to undertake to have each permit signed by the individual permittee immediately upon issuance of the permit and delivery to the permittee. The Commission believes that a grant of this request would likewise serve the public interest and the same will therefore be granted.

Accordingly, IT IS ORDERED, that the nationality requirements of section 303(1) of the Communications Act and such provisions of Section 13.4(c) of the Rules as would prevent the permittees from

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operating radio stations on said aircraft over the entire route are hereby waived for a period of one year from the date of the grant of the permits.

IT IS FURTHER ORDERED, that the applicant's signature requirement of Section 13.11 of the Rules IS WAIVED and the collective application IS ACCEPTED together with the appropriate fee for each of the applicants named in the appendix attached hereto on condition that the Radiotelephone Operator Permit (Form 753–(b)) shall not be valid until signed by the individual permittee.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Airline Transport Pilots

Chanoine, Pierre
Casse, Lionel
Boissel-Dombreval, Alfred
Agnel, Henri
Lafon, Andre
Tardieu, Guillaume
Vicens, Felix
Pallud, Maurice
Betard, Jean
Lucchesi, Arthur
Verdu, Georges
Lacoux, Pierre
Guerin, Christian
Tournadre, Rene
Bonnet, Jean
Bulte, Philippe
Cavasse, Francis
Cote, Gaston
Mespoulhes, Andre
Nicolaieff, Vitali
Terry, Raymond
Andreani, Fernand
Barra, Jacques
Butel, Michel
Caburet, Jacques
Cadier, Rene
Collot, Rene
Daudon, Rene
Duboz, Jacques
Duchange, Andre
Forest, Jean
Friang, Jean
Graugnard, Paul
Greard, Andre
Haussmann, Jean
Kisling, Jean
Lami, Rene
Lefevre, Gustave
Martin, Henri
Mims, Jacques
Perrier, Andre
Ribiere, Jean
De Saint Phalle, Jacques
Sauvage, Jean
Testu, Philippe
Tourangin, Remi
Schwartz, Jacques
Fleury, Georges
Casties, Jacques
Daquin, Michel
Le Moel, Jean
Castelnau, Alain
Corveler, Yves
Larroque, Roger
Schvallinger, Gilbert
Huc, Guy

Commercial Pilots

Astier, Rene
Avrin, Jean-Yves
Bari, Isidore
Bernage, Jean
De Besombes, Jean
Bittard, Louis
Bouchareine, Pierre
Bourgeois, Michel
Buhler, Jean
Carre, Guy
Castillo, Lucien
Chaboud, Maurice
Chauveau, Louis
Chauvin, Jacques
Chevade, Fred
Chopin, Bernard
Coutu, Roger
Decollonge, Bernard
Degueurce, Louis
Delon, Pierre
Dore, Andre
Evin, Hubert
Folmard, Claude
Francou, Christian
Geny, Bernard
Goffinet, Roger
Gorgeon, Jacques
Guibert, Jacques
Haudiquet, Yves
Henry, Francois

Lancien, Jean
Lasserre, Rene
Lemaitre, Guy
Lemoigne, Robert
Litwa, Joachim
Mace, Francois
Masson, Jacques
Moreau, Guy
Noyal, Jacques
Orgeret, Gabriel
Plusjaud, Jacques
Proust, Jean-Michel
Quille, Michel
Raimbault, Pierre
Rappeneau, Raoul
Regnier, Robert
Reinaud, Henri
Rennes, Jacques
Savignac, Andre
Schneider, Robert
Simon, Francois
Steinmann, Rene
Telmon, Fernand
Weber, Daniel
Zettel, Pierre

F.C.C. 73-273

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matters of the APPLICATION OF A. P. ST. PHILIP, INC., FOR AUTHORIZATION OF A NEW PUBLIC CLASS III-B COAST STATION TO BE LOCATED AT PALMETTO, FLA.	Docket No. 19460 File No. 137-M-L-71
and APPLICATION OF GENERAL TELEPHONE CO. OF FLORIDA FOR AUTHORIZATION OF A NEW PUBLIC CLASS III-B COAST STATION TO BE LOCATED AT CLEARWATER, FLA.	File No. 512-M-L-72
APPLICATION OF DEE WETMORE D.B.A. TAMPA RADIO MARINE SERVICE FOR RENEWAL OF LICENSE OF PUBLIC CLASS III-B COAST STATION KWB 426 AT TAMPA, FLA.	File No. 585-M-RL-111

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1973; Released March 14, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. By a Memorandum Opinion and Order, FCC 72-210, released March 15, 1972 (37 FR 5839), the application of St. Philip, Inc. for authority to operate a Class III-B public coast station in the Maritime Mobile Service at Palmetto, Florida, was designated for hearing. Therein the Commission noted that the applicant's proposed service area was being served by two stations licensed to Tampa Radio Marine Service [1] and that Tampa Radio had submitted to the Commission a letter dated December 8, 1971, which alleged that there was no need for St. Philip's proposed station. Although the aforesaid letter did not constitute a valid petition to deny,[2] the Commission designated the St. Philip application for hearing since an affirmative showing of need for the facilities requested is a prerequisite to a grant and the applicant's showing was deemed insufficient. Now before the Commission for consideration are the following pleadings which arose directly or indirectly from the St. Philip application and its designation for hearing on the issue of need:

(a) Petition for reconsideration of the designation order and for a grant without hearing filed by St. Philip on April 14, 1972. An opposition to the petition was

[1] Dee Wetmore, d/b/a Tampa Radio Marine Service (hereinafter Tampa Radio) is the licensee of Class III-B stations at Tampa, Florida, (KWB 426) and St. Petersburg, Florida (KTA 420).

[2] The December 8, 1971 letter did not comply with the affidavit and service requirements of Section 309(d) of the Communications Act of 1934, as amended. It further appears that St. Philip was unaware of its submission to the Commission until the release of our designation order.

filed by Tampa Radio on April 28, 1972; and comments were filed by the Chief, Safety and Special Radio Services Bureau (hereinafter Bureau) on April 18, 1972. St. Philip filed a reply pleading on May 26, 1972.

(b) Application filed by St. Philip on July 7, 1972, for review of the action taken by the Bureau in renewing Tampa Radio's license for KWB 426 at Tampa, Florida, on January 24, 1972, pursuant to delegated authority. Tampa Radio filed an opposition to the application on July 24, 1972; and the Bureau filed comments on July 13, 1972. A reply was filed by St. Philip on August 22, 1972.

(c) Petition for stay of the hearing in this docketed proceeding (Docket No. 19460) filed by St. Philip on July 7, 1972. An opposition was filed by Tampa Radio on July 24, 1972; and comments were filed by the Bureau on July 13, 1972.

(d) Motion for a declaratory ruling (together with a request for authorization to file the pleading) filed by the Bureau on July 27, 1972. This pleading seeks a Commission ruling concerning the acceptablility for filing of an application on FCC Form 503 tendered by General Telephone Company of Florida on July 18, 1972 (File No. 512–M–L–72), for authorization of a new Public Coast Class III–B Station to be located at Clearwater, Florida, and the effect of that application upon the question of need for existing and/or additional authorizations in the area. Although General Telephone, Tampa Radio and St. Philip were served with the Bureau's motion, and each has a substantial interest in the Commission's disposition of this motion, none has filed a pleading directly responsive to the Bureau's motion.

(e) A petition filed by St. Philip on August 18, 1972, to dismiss the above mentioned application of General Telephone. The petition was served upon General Telephone and upon counsel for Tampa Radio but neither has filed a responsive pleading.

(f) Motion for declaratory ruling (together with request for authorization to file the pleading) filed by Tampa Radio on August 9, 1972. No pleadings responsive to this motion have been received. The motion supports the Bureau's request for a declaratory ruling.

2. A plethora of problems are presented by the pleadings filed herein which will be better understood if we first set forth in some detail the pertinent facts. On July 21, 1971, St. Philip filed an application for a new Class III–B public coast station in the Maritime Mobile Service. The station would be located at Palmetto, Florida, and the applicant proposes to serve Tampa Bay and the Gulf of Mexico waters contiguous thereto. At the time this application was filed, Section 81.303 of the Commission's Rules provided as follows:[3]

§ 81.303 Duplication of facilities.

A public coast station shall not be authorized to provide a very high frequency maritime mobile service by the use of any frequency assignment above 100 MHz solely to any geographic area in which such service is already provided, or for which a valid construction permit or permits has or have been issued for the establishment of a station or stations to provide such service in that area, unless the applicant shall make an affirmative showing that the public interest, convenience or necessity would be served by such a grant, and, among other things, that there is a need for such additional facilities in the area involved, that the authorized facilities in that area are not, or will not be, adequate to meet the very high frequency communication needs in the area, and that the applicant's proposed facilities involving a frequency assignment above 100 MHz will serve the very high frequency communication needs in such area.

[3] The provisions of Section 81.303 were thereafter amended upon a number of occasions as follows: effective December 1, 1971 (36 FR 20949, 20960); effective August 14, 1972 (37 FR 13548, 35 FCC 2d 642); and effective December 15, 1972 (37 FR 23838, 37 FCC 2d 938). The pertinent events occurred prior to the foregoing amendments and none of the pleadings filed herein have taken the said amendments into account. By reason of the particular circumstances of this case, the equities in favor of certain of the parties, and other public interest considerations, we have determined to dispose of the matters before us on the basis of the Rule prior to its amendment. However, we wish to emphasize that our disposition here constitutes no holding that the prior rule will be applied to other pending applications which do not present like equities and public interest considerations.

3. Since St. Philip's proposed service area would overlap the service areas of Tampa Radio's existing stations and it had not submitted sufficient supporting data to enable the Commission to determine whether a need existed for the additional facilities, the St. Philip application was designated for hearing. However, two other actions taken in related proceedings must be considered in the disposition of the several requests for relief now under consideration, and they pose serious problems to a solution which will be fair and equitable to the parties and meet the requirements of the public interest. The first relates to the renewal of Tampa Radio's license for Station KWB 426 and the second to the application for a Class III–B station tendered for filing by General Telephone Company of Florida.

THE APPLICATION FOR REVIEW

4. On October 19, 1971, approximately three months after St. Philip filed it application for a new Class III–B station, Tampa Radio filed an application for renewal of its KWB 426 station license (File No. 585–M–RL–111) and public notice of the filing was given by the Commission on December 2, 1971 (Public Notice Report No. 572, Mimeo. 77553). No petition to deny or other objection to renewal was filed, and on January 24, 1972, the Bureau, acting pursuant to delegated authority (Sec. 0.331 of the Rules), granted the renewal application. Tampa Radio was advised of the action taken, and the renewal order was placed in the station files but no public notice thereof was given. By an application for review filed on July 7, 1972, St. Philip seeks to have the renewal of license set aside and the renewal application designated for a comparative hearing in a consolidated proceeding with its application for a new facility. St. Philip asserts that the Bureau erred in making the KWB 426 renewal grant while its own application was pending and that it was thereby unlawfully deprived of its right to a comparative hearing with Tampa Radio under the *Ashbacker* doctrine,[4] since mutual exclusivity may result from economic conflict as well as from electrical interference. In explanation for its failure to apply earlier for review, St. Philip states that no public notice was given of the grant of the Tampa Radio renewal application, that the Bureau had published no advance notice that it considered "the Palmetto proposal to be in conflict, under Section 81.303 of the Rules, with Tampa's marine facilities,"[5] and that it was unaware of the license renewal until a review of the Commission's files for other purposes by counsel for St. Philip on June 7, 1972, revealed that fact.[6] By a letter received at the Commission on June 8, 1972, counsel for St. Philip advised that an application for review of the grant of renewal would be filed and the pleading was

[4] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945).

[5] As previously noted the order designating St. Philip's application for hearing on the issue of need was not released until March 15, 1972.

[6] It is undisputed that no public notice was issued by the Bureau listing the renewal grant or specifying that the renewal application and the application for a new facility were potentially mutually exclusive applications. Procedural rules to establish cut-off dates and to clarify the provisions relating to mutually exclusive applications for facilities in the Safety and Special Radio Services have recently been promulgated by the Commission. See *Report and Order in Docket No. 19484*, 35 FCC 2d 832, released July 11, 1972; and amended, FCC 73–114, released February 5, 1973.

filed on July 7, 1972. St. Philip argues that the said filing was timely since it occurred within 30 days after it first learned of the renewal of the KWB 426 station license.[7]

5. The Bureau confesses error in granting the Tampa Radio renewal application without granting the St. Philip application as well or alternatively designating both applications for comparative hearing in a consolidated proceeding. It attributes this error "to administrative oversight on the processing line which handles large numbers of applications and to the absence of petitions to deny." The Bureau neither supports nor opposes the application for review on the merits but questions whether the application was timely filed and whether any remedy is available to correct its erroneous action. Even assuming that the order granting renewal of the Tampa Radio license was not "released" within the contemplation of Section 1.104(b) of the Rules,[8] so that the 30-day filing provision contained therein did not become operative, the application for review may nevertheless be untimely, the Bureau asserts. Since St. Philip was placed on notice by the release of the Commission's designation order that the Tampa and Palmetto applications were not being treated as mutually exclusive, the Bureau urges that St. Philip could have requested that the applications be so considered in its petition for reconsideration of the designation order which had been filed on April 14, 1972.

6. Tampa Radio opposes the application both on the grounds that it was untimely filed and on the merits. In addition to the matters asserted by the Bureau as sufficient to place St. Philip on notice of the critical events, Tampa Radio alleges that Mr. James Pope, the signatory of the St. Philip application and its vice-president, is an engineer who was formerly employed by Tampa Radio; that he was "intimately acquainted with the station license"; and that he cannot now be heard to say he was unaware of its expiration date. Tampa Radio further contends that *Ashbacker* is inapplicable since the two applications are not economically mutually exclusive in the sense that the grant of one would necessarily preclude a grant of the other but, in fact, would do no more than lessen the probability of an award to the other. In these circumstances, it contends, where there exists the possibility of a grant of both applications, comparative consideration is not required, citing, among others, the Commission's decision in *Mount Pleasant Radio, Inc.* 20 RR 2d 761 (1970).[9]

---

[7] In the application for review, St. Philip asserts that a grant of its previously filed petition for reconsideration, discussed *infra*, of the designation order would moot the review application.

[8] In pertinent part, this Section provides that any person desiring review of final action taken pursuant to delegated authority "shall file either a petition for reconsideration or an application for review (but not both) within 30 days from the date of release of the document containing the full text of such action, or in case such document is not released, after release of a public notice announcing the action in question."

[9] *Mount Pleasant* related to the effect of an award of an FM station upon the 307(b) issue in a proceeding involving an application for an AM station and clearly is inapposite here. Other cases cited also fail to support Tampa Radio's contention. As pointed out by St. Philip, Tampa Radio's contention that under Section 81.303 the application for the proposed station must be denied because it would duplicate the existing service is totally inconsistent with the contention set forth above that *Ashbacker* is inapplicable because grants of both its renewal application and the application for the proposed facility are possible.

THE PETITION FOR RECONSIDERATION

7. St. Philip's petition for reconsideration is directed to the question of need for additional public coast facilities in its proposed service area and seeks to supplement the showing initially made in its application. Attached to the petition is an engineering exhibit depicting the theoretical contours of the existing Tampa and St. Petersburg stations and the proposed Palmetto station which, St. Philip contends, discloses that a substantial area beyond the theoretical contours of the existing stations would be served by the proposed station. Based on another engineering report submitted therewith, St. Philip also asserts that "the actual effective range of the St. Petersburg Beach station (nearer to Palmetto than the Tampa station) is substantially smaller than predicted by the Commission's theoretical standards." To further bolster its showing of need for additional public coast service, St. Philip conducted a survey among various boating interests in the area as a result of which it obtained a number of letters and survey forms favorable to its position. St. Philip maintains that the survey demonstrates "overwhelmingly the need for the proposed station and the gross inadequacy of the service presently available." The Bureau asserts in its responsive comments that the "showing contained in the Petition for Reconsideration, absent specific factual allegations to the contrary, constitutes a *prima facie* compliance with the above-emphasized requirements of Section 81.303 of the Rules." It further states that if the said showing had been submitted to the Bureau before the issuance of the designation order and no rebuttal showing more specific than that contained in Tampa Radio's December 8, 1971, letter had been made, "the Bureau would have granted the application pursuant to delegated authority."

8. Tampa Radio opposes the petition on the ground that Section 81.303 prohibits the duplication of service in the absence of a showing that the existing facilities are insufficient to meet the needs of the public; that in addition to the facilities shown on St. Philip's engineering exhibit, there is a newly licensed facility at Venice, Florida; that the St. Philip proposal "is incorporated virtually in its entirety" by the contours of these stations; and that by reason of its contrary evidence on the issue of need an evidentiary hearing is necessary on St. Philip's proposal in order to resolve material and substantial questions of fact presented by the application. Tampa Radio also challenges the sufficiency of the letters submitted by St. Philip, claiming that they represent a confusion in the public mind as to the type of service under consideration, and the present availability of such service in the area. It also denies that any basis exists for dissatisfaction with its own service. As to the survey forms, Tampa Radio challenges the adequacy of the techniques employed and their sufficiency to resolve the issue of need.

9. St. Philip in its reply to the opposition argues that, despite Tampa Radio's attack upon the sufficiency of the showing of need and its attempt "to suggest contradictory interpretations solely on the basis of undocumented and otherwise unsupported allegations" as to certain of the letters, "there remains sufficient justification for the relief requested—." It further contends that a number of the letters were

unrefuted on the question of need and that as to others, there is no documentary support for Tampa Radio's assertion that the makers were confused or that St. Philip had misinterpreted their contents. Like representations are made by St. Philip with respect to Tampa Radio's attack upon the sufficiency of the survey. Finally, St. Philip reasserts the position advanced in its petition that an adequate showing of need had been made to warrant a grant of its application without hearing.

10. Before reaching the ultimate issue of whether St. Philip merits any relief under the facts of this case, the following preliminary questions must be resolved: (a) whether the Bureau erred in granting the KWB 426 renewal application pursuant to delegated authority; (b) whether St. Philip was entitled to a comparative hearing in a consolidated proceeding with Tampa Radio which was unlawfully cut off by an erroneous grant of the Tampa Radio renewal application; and (c) assuming that St. Philip was unlawfully deprived of a right to a comparative hearing with the renewal applicant, whether it forfeited its right to obtain remedial relief by the failure to make timely application therefor.

11. It is conceded by the Bureau and established by the pleadings that error was committed in granting the KWB 426 renewal application pursuant to delegated authority. The Chief, Safety and Special Services Bureau, acting jointly with the Chief, Common Carrier Bureau, possesses delegated authority to renew a Class III–B station license in the Maritime Service only if such action is "(a) consistent with and pursuant to the rules governing—" that service. See Section 0.331 of the Rules. However, Rule Section 1.971(a)(1) and (4) expressly prohibits the grant of such an application without hearing where there are substantial and material questions of fact or where the grant of the application would preclude the grant of a mutually exclusive application.[10] St. Philip's application for a new Class III–B public coast station was pending before the Commission at the time Tampa Radio's renewal application was filed and clearly it was a matter of which the Commission could take official notice. While both applications could be granted pursuant to delegated authority if the public interest would be served thereby, the fact that one was designated for hearing on the issue of need indicates that a substantial and material question existed as to the need for additional public coast service and that a grant of one might preclude the grant of the other. In these circumstances the Tampa Radio application for renewal of license, at the very least, merited the attention of the Commission and should not have been acted upon pursuant to delegated authority.

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[10] The pertinent provisions of this Section are as follows:

(a) The Commission will grant without a hearing an application for a station authorization if it is proper upon its face and if the Commission finds from an examination of such application and supporting data, any pleading filed, or other matters which it may officially notice, that:

(1) There are no substantial and material questions of fact;

* * * * * * *

(4) A grant of the application would not preclude the grant of any mutually exclusive application;

* * * * * * *

12. Furthermore, if initial processing of the applications disclosed that the need for both the existing and the proposed facilities could not be ascertained without a hearing, then a comparative hearing in a consolidated proceeding was mandatory under the Rules and under *Ashbacker*. Applications may be mutually exclusive by reason of the requirement of Section 81.303 as well as by reason of electrical interference. See *Collier Electric Co.*, 14 RR 848 (1956). Thus the grant of the renewal application for the Tampa station while the application for the Palmetto station was pending and the subsequent designation of the Palmetto application for hearing on the issue of whether a public need exists for the additional public coast service in the area deprived St. Philip of a substantial right and, if only one application is to be granted,[11] remedial relief should be provided if such is available. The next question to be determined, therefore, is whether St. Philip took timely and appropriate action to preserve its right to relief.

13. We believe that the principles which have been applied to the Commission's cut-off rules[12] are applicable to the situation herein presented and that the question of whether St. Philip now has a right to a comparative hearing with the KWB 426 renewal application must be judged in the light of those principles. Thus the courts have held that where the Commission adopts a strict cut-off policy it must take into account that it is "dealing with a matter where full and explicit notice is the heart of administrative fairness." *Radio Athens, Inc.* (WATH) v. *Federal Communications Commission*, 130 U.S. App. D.C. 333, 401 F2d 398 (1968). In issuing a public notice of a cut-off date, the Commission must "fairly advise prospective applicants of what is being cut-off by the notice." *Ridge Radio Corporation* v. *Federal Communications Commission*, 110 U.S. App. D.C. 277, 292 F2d 770 (1961). And in rejecting an application on the ground that it was filed after the cut-off date, the Commission may not be hypertechnical and arbitrary." *Natick Broadcast Associates, Inc.* v. *Federal Communications Commission*, 128 U.S. App. D.C. 203, 385 F2d 985 (1967).

14. As pointed out by St. Philip, no cut-off list or other public notice was issued at any time which placed the applicant on notice prior to renewal of KWB 426 that a grant of the Tampa Radio renewal application might adversely affect its own application or that some affirmative action was necessary to protect St. Philip's right to comparative consideration with KWB 426. While both the Bureau and Tampa Radio refer to the fact that a public notice was given of the filing of the KWB 426 renewal application and that no petition to deny the application was filed by St. Philip, we are not persuaded that it thereby waived its rights to challenge the grant of renewal. Both in its application for a new Class III–B facility and in its petition for reconsideration, St. Philip asserted the need for additional public coast service in the area and a petition to deny on the ground

[11] The question of whether both applications or only one may be granted will be more fully considered in a later portion of this decision.

[12] Under the Commission's cut-off rules, a competing application must be filed by a specified date or before a specified occurrence in order to be eligible for comparative consideration in a consolidated proceeding. See for example, Section 1.227(b)(3) and 1.591 of the Rules.

of mutual exclusivity would have been inconsistent with the basis of its own application. If any obligation existed to file a petition to deny, it was at least as much that of Tampa Radio which objected to the claimed need for additional service. That objection was contained in a letter to the Commission which was never served on St. Philip and which was not brought to its attention until the release of the order designating the St. Philip application for hearing. We do not believe that administrative fairness permits us to penalize St. Philip and confer a benefit on Tampa Radio because of the failure to take action which the competing applicant likewise failed to take. Moreover, the designation order which placed St. Philip on notice for the first time that the continued operation of the KWB 426 station might result in the denial of its application for a new facility because of unwarranted duplication was not released until more than seven weeks after the grant of the renewal application. Thus, at the time the renewal application was granted and for a considerable period thereafter St. Philip was not provided with the "full and explicit notice" which "fairly" advised the applicant that a right to a comparative hearing was being cut-off by the grant of renewal to Tampa Radio.

15. As for the Bureau's contention that St. Philip forfeited any right to challenge the renewal grant by its failure to raise the matter in its petition for reconsideration, the simple answer is that the rules do not so provide. Section 1.104(b) of the Rules specifically provides that a person aggrieved by final action taken pursuant to delegated authority has a period of 30 days from the "release of the document containing the full text of such action" or from the "release of a public notice announcing the action" within which to file an application for review. Since neither the text of the renewal order nor a public notice thereof was released, the 30 day provision cannot serve to bar St. Philip's application for review. St. Philip alleges that it first received actual notice of the KWB 426 renewal on June 7, 1972, and that allegation stands unchallenged. We therefore conclude that the application for review filed by St. Philip on July 7, 1972 was timely; that its right to any remedial relief which may be warranted is not barred because the renewal grant was not challenged in its petition for reconsideration; and that, if the facts and circumstances of this case so require, the Commission may vacate the Bureau's action in renewing the KWB 426 license and designate the renewal appliaction for a comparative hearing in a consolidated proceeding with the St. Philip application for a new station at Palmetto.

THE GENERAL TELEPHONE APPLICATION

16. The third facet of this problem which must be discussed in some detail in order to place the matter in proper perspective is the application of General Telephone Company for Class III–B facilities at Clearwater, Florida. General Telephone presently is the licensee of Class II–B Public Coast Station WFA at Madeira Beach and Indiana Rocks, Florida, and its application for Class III–B facilities results from the determinations made in our rule-making proceeding in Docket No. 18307. In the *First Report and Order* in that proceeding 23 FCC 2d 553, released June 16, 1970, the Commission undertook a

revision of the rules concerning ship to shore communications which had as its ultimate objective for the purpose of promoting marine safety the exclusive use of VHF for short range communications and the availability of medium range frequencies in the band 2000–2850 kc/s only to stations equipped with VHF but having a need, in addition, for longer range capability. In furtherance of this objective the Commission held that:

(a) Only single sideband (SSB) transmitters would be authorized in new ship radio installations after January 1, 1972, although double sideband (DSB) equipment authorized prior to that date may be used until January 1, 1977;
(b) After January 1, 1977, the use of 2 Mc/s radiotelephony will be limited to SSB, it will be available only to vessels which are also equipped with VHF, and may not be employed for communications which are within VHF range;
(c) With certain exceptions not here pertinent, 2 Mc/s will be available to public and limited coast stations after January 1, 1977, only where service is also provided on VHF.

17. From the foregoing, particularly (c) above, it is apparent that unless a public coast station operating only with frequencies in the 2000–2850 kc/s band obtains authorization to provide VHF service or obtains a waiver of the requirement, it must discontinue all operations by January 1, 1977. The Commission therefore required all licensees of 2 Mc/s public and limited coast stations to apply to add frequencies in the band 156–162 Mc/s. However, since the notice of proposed rulemaking had not proposed that 2 Mc/s public and limited coast stations provide VHF capability by January 1, 1972, the date of discontinuance of DSB, the Commission deemed it inappropriate to require the submission of such applications by that date. The Commission did, however, "urge that licensees of 2 Mc/s public and limited coast stations submit applications to add VHF by January 1, 1972", (23 FCC 2d at 566). The Commission further provided therein as follows:

"To facilitate the addition of VHF to licenses of public and limited coast stations which are currently authorized to use frequencies in the band 2000–2850 kc/s the Commission is requiring (see Secs. 83.104 (c)(2) and 81.360(a)(2)) that licensees of 2 Mc/s stations submit application to add appropriate frequencies in the band 156–162 Mc/s. *In processing these applications for public coast stations, account will be taken of existing VHF public coast facilities only to the extent that electrical interference will be caused to existing VHF service*" (emphasis supplied).

18. In its application, General Telephone emphasizes the requirement in paragraph 45 that it apply for VHF service and relies in particular upon that portion of the statement set forth above which is italicized. It asserts that the proposed station will cause no electrical interference to existing VHF service. The applicant further states that it proposes to serve all of Tampa Bay "which has one of the largest deep water ports in the Southeastern USA"; that the requested VHF service should be authorized to enable it to continue to handle "the large volume of local traffic now being handled" by its Class II–B station and to permit a continuity of communications with approaching vessels already in contact with its Class II–B operator which must switch to VHF.

19. A petition to dismiss the General Telephone application was filed by St. Philip on the ground that its acceptance for filing is barred

by Section 1.227(b) (3) and (4) of the Rules.[13] In support of its position, St. Philip alleges that a question is presented as to whether duplicating services are needed, that the applications are therefore mutually exclusive and, since the St. Philip application was designated for hearing prior to the submission of the General Telephone application, the latter must be dismissed. St. Philip further alleges that General Telephone acquired its Class II–B license from Southern Bell Telephone Company through an assignment which was consummated on October 29, 1971, the St. Philip application and the Tampa Radio renewal application were both already pending before the Commission, and that therefore General Telephone took the assignment of license with full knowledge of the pending application.[14]

20. The General Telephone application is not in hearing status but it has been brought to our attention through the motion for a declaratory ruling filed by the Bureau. Calling attention to what seems to be a policy conflict between the provisions of Section 81.303 that unnecessary duplication of service be avoided in the interests of frequency conservation and the determination in the Docket No. 18307 proceeding that licenses of Class-II public coast stations should possess the capability to communicate on VHF frequencies, the Bureau asserts that, in fact, no conflict exists. It contends that only *unnecessary* duplication is to be eliminated, not *all* duplication. Thus, the Bureau states, some duplication is desirable in order to make possible a continuity of communications while traversing from the service area of one station to that of another. The Bureau further asserts that authorizing Class II–B stations to provide service on VHF even where there are existing Class III–B stations is desirable in order to ensure continuity of communications between coast stations and ships which may be moving into or beyond VHF range; and that paragraph 45 of the *First Report and Order* in Docket No. 18307 contemplated such duplication. These benefits, it contends, outweigh any disadvantages of duplication and consequently are not unnecessary duplication. The Bureau therefore suggests that the Commission adopt an interpretation of its policy which would permit the grant of General Telephone's application without consideration of the question of need for additional service. It further suggests, however, that the grant of authority to General Telephone to provide VHF service should be considered when determining the need for additional Class III–B coast stations "because the disadvantages generally associated with unnecessary duplication apply to such cases."

21. Tampa Radio's request for a declaratory ruling is essentially in agreement with the Bureau's views. However, it asserts that, while a grant of the General Telephone application would have "a clear bearing on the question of need" for the St. Philip proposal, it would "in no way prejudice consideration of Tampa Radio's periodic license renewals."

[13] Insofar as is here pertinent, the Rule provides that an application which is mutually exclusive with a previously filed application will be considered with the prior filed application only if tendered for filing before the prior filed application is designated for hearing. If a mutually exclusive application is filed after the prescribed date, it will be dismissed without prejudice and will be eligible for refiling only after final disposition of the previously filed application.

[14] Tampa Radio also filed a petition to deny the General Telephone application because two working frequencies were sought. When the applicant modified its request to the working frequency, Tampa Radio withdrew its opposition pleading.

CONCLUSIONS

22. In the disposition of the matters under consideration we propose to make no general policy determinations. We have before us a unique set of circumstances including an adjudicatory proceeding, an application for review of an order issued pursuant to delegated authority, and an application for new facilities which is in a nonadjudicatory status. The relevant rules have been revised since most of the events discussed herein occurred and we have determined that by reason of the particular circumstances of this case, the equities of certain of the parties, and the other public interest considerations set forth herein, to dispose of the matters before us on the basis of the rules in effect prior to their recent revisions (See footnote 3, *supra*). This case, therefore, is not an appropriate vehicle for declaring policy. We deem it advisable to make our policy enunciations concerning multiple applications for public coast stations in connection with situations of more general applicability and under the current rules.

23. Preliminary processing of the General Telephone application has been completed and it has been determined that there are no problems of electrical interference and no technical or financial deficiencies in its proposal. To enable us to dispose of all of the matters submitted for our consideration, we must have the General Telephone application before us. We shall therefore on our own initiative consider and act upon the application at this time.

24. We agree with the Bureau that public interest considerations support a grant of the General Telephone application despite the existence of other Class III–B facilities in the service area. In our rulemaking in Docket No. 18307 we held that the capability of existing Class II–B public coast stations to provide VHF service was essential to the improvement of marine safety and we included special provisions to facilitate their acquisition of VHF capability. Continuity of communications with vessels approaching from beyond to within VHF range or departing the reach of VHF could thus be made possible. Furthermore, General Telephone's allegation that it is currently handling a large volume of local traffic is undisputed and provides an additional ground favoring a grant since it indicates a need for the continuation of an existing service.

25. Thus, a grant of the General Telephone application appears to be consistent with the public interest and to be warranted despite the existence of duplicating services in the area unless the failure to file earlier for the facilities deprives it of the benefits of paragraph 45 of Docket No. 18307 or unless the application must be dismissed pursuant to Section 1.227(b)(3) of the Rules. Insofar as paragraph 45 is concerned, General Telephone is manifestly entitled to its benefits. Although we urged the licensees of Class II–B facilities to apply for frequencies in the 156–162 Mc/s band as soon as possible, we expressly held that the failure to make application by January 1, 1972, would not preclude them from obtaining the special benefit provided therein, and we did so because of the public interest considerations in having existing Class II–B stations obtain VHF capability. In these circumstances, and particularly since General Telephone did not obtain the facilities in question until October 1971, we do not believe that its

tender of an application on July 18, 1972 constituted such laches as to warrant our withdrawing from the applicant the paragraph 45 benefits.

26. The Bureau's further contention that an authorization of Class III–B facilities for General Telephone should be issued and then taken into account in determining whether a need exists for the facilities requested by St. Philip must be rejected. We not only believe that such a procedure would be grossly unfair and inequitable but we are aware of no theory of law or case precedent which would sanction such a procedure under the circumstances existing here. The St. Philip application was filed approximately one year before that of General Telephone. It was designated for hearing four months before the General Telephone filing which therefore may be subject to dismissal under Section 1.227(b) of the Rules. Even assuming that we were to grant a waiver of that rule, St. Philip would be entitled at the very least to a consolidated hearing with General Telephone under the doctrine of *Ashbacker* to determine, in the event that only one may be granted, which of the two proposals would better serve the public interest. But certainly we cannot grant the General Telephone application without a hearing and thereafter deny that of St. Philip on the ground that there is no need for additional Class III–B coast station service in the area. Consequently, unless the St. Philip application is acted upon, the General Telephone application must either be dismissed or held for hearing in a consolidated proceeding with that of St. Philip and Tampa Radio.

27. The only question remaining for resolution with respect to the St. Philip application is whether the applicant has made the affirmative showing required by Section 81.303 that a need exists for the proposed facilities. Very significant, in our view, is the showing of need made by St. Philip in its petition for reconsideration. A substantial number of letters from groups and individuals who are either potential users of the proposed service or are otherwise interested in matters pertaining to marine radio service or marine safety indicating a need for additional public coast service was submitted. In addition, the applicant conducted a survey in its service area by means of a printed questionnaire which contained a brief statement of its proposed service. The responses to this questionnaire received from area boaters lend further support to St. Philip's showing of need for additional public coast service. The Bureau which is responsible for the processing of such applications has at no time in any pleading filed in these proceedings receded from or modified the assertion in its responsive pleading that the St. Philip application would have been granted pursuant to delegated authority had the showing made in the petition for reconsideration been initially submitted "absent specific factual allegations to the contrary—."

28. No such contrary showing has been made. Although retractions were made by some of the individuals who gave statements to St. Philip, a large number remain unrefuted. These unrefuted statements together with the survey forms submitted constitute a substantial showing toward meeting the applicant's obligation under Section 81.303. Furthermore, other factors present in this case reinforce our view that the duplication which will result from a grant of the St. Philip

application is not unnecessary duplication. Although the duplication by the proposed station of the service areas of the Tampa Radio stations and the recently authorized station at Venice, Florida, is extensive, the existing stations do not cover all of the area proposed to be served by St. Philip. Another benefit to be derived from the St. Philip proposal is that a continuity of communications to and from vessels crossing coastal station service boundaries will be facilitated since only one landline circuit need be utilized.

29. We further conclude that a grant of both the St. Philip and the General Telephone applications will serve to hasten the achievement of the objectives in our Docket No. 18307 rulemaking proceeding to improve the maritime radio safety system by establishing VHF as the exclusive frequencies for short range communications and limiting the use of frequencies in the 2000–2850 kc/s band to communications beyond VHF range. In recent years there has been a rapid and substantial increase in the number of vessels operating in U.S. waters with a continuing increase in the number of vessels equipped with radio (Notice of Proposed Rulemaking in Docket No. 18307, 33 FR 14121, September 18, 1968). The result has been a serious congestion on radiotelephony 2 Mc/s channels which limits the effective use of those channels by vessels unable to fulfill their communications needs solely by VHF. It is for the purpose of relieving such congestion that we are confining short range communications to VHF, but the establishment of adequate coast station service is essential if our objective is to be achieved. We therefore provided in our Docket No. 18307 rulemaking proceeding that Class II–B coast stations would be authorized to provide Class III–B service irrespective of the existing facilities except for the matter of electrical interference.

30. Thus we contemplated that some duplication which exceeds that sanctioned by a strict application of the provisions of Section 81.303 might result from an award of Class III–B facilities to licensees of Class II–B stations but concluded that overriding public interest considerations justified such action. We believe that like public interest considerations justified grants of the General Telephone and St. Philip applications. As heretofore stated, a grant of VHF capability to General Telephone will further our Docket No. 18307 objectives. With respect to St. Philip, taking into account the fact that its application was on file long before that of General Telephone and the Bureau's assertion that under the then applicable rules the showing of need in St. Philip's petition for reconsideration would have justified a grant pursuant to delegated authority if made initially, we believe that this applicant's status—*vis-a-vis* General Telephone—may be equated with that of an existing station. In view of all of the foregoing, we conclude that a grant of the General Telephone and St. Philip applications will serve the public interest by substantially promoting marine safety in that the commencement of VHF service by General Telephone will be expedited, thus ensuring a continuity of communications with vessels operating both within and beyond VHF range; the congestion on radiotelephony 2 Mc/s channels will be reduced; additional VHF coast station service will be made available more promptly to the ever increasing number of boaters whose ship to shore communications needs will be satisfied by VHF and by the

other heretofore enumerated benefits to be derived from St. Philip's proposal.

31. Accordingly, IT IS ORDERED, That:

(a) The application of A.P. St. Philip, Inc. for authorization of a new public Class III–B coast station at Palmetto, Florida, filed July 21, 1971 (File No. 137–M–L–71), IS GRANTED.

(b) The petition for reconsideration filed by A.P. St. Philip, Inc. on April 14, 1972 IS GRANTED, our Memorandum Opinion and Order, FCC 72–210, released March 15, 1972 designating the St. Philip application for hearing IS VACATED, and the proceeding in Docket No. 19460 IS TERMINATED.

(c) In view of our grant of St. Philip's application as set forth in (a) above, the application filed by A.P. St. Philip, Inc. on July 7, 1972 for review of the action taken by the Chief, Safety and Special Radio Services Bureau in granting the application of Dee Wetmore d/b/a Tampa Radio Marine Service for renewal of the license of station KWB 426 at Tampa, Florida, on January 24, 1972 pursuant to delegated authority IS DISMISSED AS MOOT.

(d) In view of our disposition of this proceeding, the petition for a stay of hearing in this docketed proceeding filed by St. Philip on July 7, 1972, IS DISMISSED AS MOOT.

(e) In view of our disposition of this proceeding, particularly the grant of the St. Philip application, the petition filed on August 18, 1972 by A.P. St. Philip, Inc., to dismiss the application of General Telephone Company of Florida for authorization of a new public Class III–B coast station at Clearwater, Florida, File No. 512–M–L–72, IS DENIED; and the said application of General Telephone Company of Florida IS GRANTED.

(f) The requests for authority to submit additional pleadings filed by the Chief, Safety and Special Radio Services Bureau on July 27, 1972, and by Tampa Radio Marine Service on August 9, 1972, ARE GRANTED, and the pleadings tendered by the said parties ARE ACCEPTED FOR FILING.

(g) The Motion for a Declaratory Ruling filed by the Chief, Safety and Special Radio Services Bureau IS DENIED.

(h) The Motion for a Declaratory Ruling filed by Tampa Radio Marine Service IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

40 F.C.C. 2d

109–032—73——2

F.C.C. 73–255

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. AND THE ASSOCIATED BELL SYSTEM COS. Charges for Interstate Telephone Service Transmittals Nos. 10989, 11027, and 11657	Docket No. 19129

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1973; Released March 13, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE DISSENTING; COMMISSIONER REID ABSENT.

1. On January 12, 1973, we released our Memorandum Opinion and Order [1] in this proceeding which gave permission to the American Telephone and Telegraph Company (AT&T) to file increased rates for Message Toll Service (MTS) and Wide Area Telephone Service (WATS) which it had proposed on December 1, 1972.[2] We permitted the MTS increases to be filed on not less than 10 days notice since the same or greater increases were first filed in November, 1970, but had not become effective. The WATS increases, however, were not previously filed and were therefore required to be filed on not less than 60 days notice in accordance with the normal requirements of Part 61 of our Rules. We also stated in that order that we expected to order suspension of the WATS increases for the full three months provided for in Section 204 of the Communications Act.

2. By Transmittal No. 11657, dated January 12, 1973, AT&T filed revised tariff pages to increase the rates for MTS service effective January 22, 1973 and for WATS service effective March 13, 1973. Accompanying the transmittal was supporting material intended to comply with Section 61.38 of our Rules in regard to the WATS rates.

3. As has been previously indicated in this proceeding,[3] the rate increases which have been filed for MTS and WATS are to be interim in nature, subject to our decision in Phase II of this proceeding and to our decision in Docket No. 18128. Since the WATS rates have not been put expressly in issue herein, this order will serve to amend formally the issues in this regard, and to enter a suspension and accounting order with respect to the WATS rates.[4]

4. When we stated in our order permitting the filing of the increased rates that we expected to suspend the WATS increases for

[1] F.C.C. 73–44.
[2] See our Decision and Order of November 22, 1972, in Phase I (rate of return) of this proceeding, 38 F.C.C. 2d 213, 251.
[3] See Memorandum Opinion and Order referred to in paragraph 1 above.
[4] The MTS rates which became effective January 22, 1973 were made subject to accounting and refund by Paragraph 124 of our Decision and Order in Phase I of this proceeding, 38 F.C.C. 2d 213, 251 (1972); 27 F.C.C. 2d 149, 150 (1971).

the full three months period, we were mindful of the then effective Price Commission regulations which prohibited interim rate increases from becoming effective if they had not been suspended for the maximum period authorized by law.[5] We had previously decided that the MTS rates would not be required to be suspended so long as they did not exceed those filed in November 1970, since they had already been suspended within the meaning of the Price Commission Regulations.[6] It now appears that there is no longer any requirement to suspend an interim increase for the maximum period since the Price Commission regulation was superseded effective January 11, 1973 by the Cost of Living Council Phase III Regulations.[7] The Phase III regulations contain no requirement for suspension of interim rate increases. Our November 22, 1972 Decision in Phase I of this proceeding concluded that a return for AT&T of 8.5% on its interstate and foreign operations was the minimum required to enable it to attract capital at a reasonable cost, to maintain its credit, assure continued, adequate and safe interstate and foreign communications service to the public, and to provide for necessary expansion to meet future requirements.[8] We further found that achievement of that rate of return would require rate increases which produce $145 million in additional net income before Federal Income Tax.[9] Inasmuch as the only reason for deferring the effectiveness of the WATS portion of the $145 million increase was the now superseded Price Commission regulation, we shall suspend the WATS increase for one day only, in order that the accounting and refund provisions of Section 204 of the Act may be invoked.

5. Accordingly, IT IS ORDERED, That the effectiveness of the revisions in AT&T's Tariff F.C.C. No. 259 filed under Transmittal No. 11657 IS SUSPENDED until March 14, 1973;

6. IT IS FURTHER ORDERED, That the lawfulness of the rate changes in AT&T Tariff F.C.C. No. 259 proposed by Transmittal No. 11657 shall be at issue in this proceeding, and that the inquiry therein shall include, but not be limited to, consideration of:

a. The amount of operating revenues that are or may reasonably be expected in the foreseeable future from interstate communication services rendered by use of the plant and facilities of the Bell System as a consequence of the particular WATS rate levels suspended herein, with particular reference to the projected gross revenues to be derived therefrom, the changes in traffic level and usage patterns anticipated as a result of the rate change, and the associated changes in expense level;

b. The cost justification, demand factors and other pertinent consideration in respect to the structure and differing rate levels herein suspended for all categories of WATS service;

c. In light of determination as to the foregoing, whether the instant increases in WATS rates are just and reasonable within the meaning of Section 201(b) of the Communications Act of 1934, as amended;

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[5] 6 C.F.R. 300, 307, 37 Fed. Reg. 18895.
[6] 37 F.C.C. 2d 754, 756 (1972).
[7] 6 C.F.R. 130.1, 130.80–81; 38 Fed. Reg. 1479.
[8] 38 F.C.C. 2d 213, 245 (1972).
[9] 38 F.C.C. 2d 213, 251 (1972).

d. Whether the specific charges for WATS service herein suspended will subject any person or class of persons to unjust or unreasonable discrimination, or give any undue preference or advantage to any person, class of persons, or locality, or subject any person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage within the meaning of Section 202(a) of the Communications Act of 1934, as amended;

e. Whether the Commission should prescribe just and reasonable charges or maximum or minimum or maximum and minimum charges to be hereafter followed with respect to WATS service and, if so, what charges should be prescribed;

7. IT IS FURTHER ORDERED, That pending the determination of this proceeding, or until further order of the Commission, the carriers collecting amounts under the above-mentioned tariff schedules shall keep accurate account of such amounts, specifying by whom and on whose behalf such amounts were paid;

8. IT IS FURTHER ORDERED, That, AT&T shall make no changes in the schedules herein suspended during the pendency of this proceeding without prior approval of the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-113

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of VERNA M. CALISTI AND JOHN K. SEREMET, D.B.A. CENTRAL WESTMORELAND BROADCASTING CO., JEANNETTE, PA. For Construction Permit	Docket No. 19042 File No. BP-17690

APPEARANCES

Donald E. Bilger and *Carter E. Keithley*, on behalf of Central Westmoreland Broadcasting Company; *Thomas Schattenfield* and *David Tillotson*, on behalf of WHJB, Inc.; *Arthur V. Weinberg*, on behalf of Albert A. Calisti; and *Gerald M. Zuckerman*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted March 13, 1973; Released March 20, 1973)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. This proceeding involves the application of Verna M. Calisti and John K. Seremet, d/b as Central Westmoreland Broadcasting Company (Central), for a construction permit for a new standard broadcast station at Jeannette, Pennsylvania. The application was originally filed on March 28, 1967, by Albert A. Calisti, Verna M. Calisti, John K. Seremet and L. Stanley Wall, d/b as Albert A. Calisti Associates (Associates).[1] On January 5, 1968, the Associates partnership was dissolved and a new partnership (Central) was formed by Verna Calisti, Seremet and Wall.[2] Albert Calisti, the husband of Verna Calisti, withdrew from the partnership because his criminal record was brought to the Commission's attention in a petition to deny the Associates' application, filed by WHJB, Inc. (WHJB), licensee of Stations WHJB (AM) and WOKU (FM), Greensburg, Pennsylvania. On January 19, 1968, the application was amended to reflect the aforementioned changes in the partnership; and on August 7, 1968, the application was amended again to show the withdrawal of L. Stanley Wall as a partner and the elimination of Albert A. Calisti as a proposed employee. By Memorandum Opinion and Order, released October 13, 1970, the Commission designated the Central application for hearing along with two others since dismissed.

[1] The percentages of ownership were as follows: Albert Calisti (42.1%), Verna Calisti (42.1%), John Seremet (7.9%) and L. Stanley Wall (7.9%).

[2] The new percentages of ownership were: Verna Calisti (84.2%), John Seremet (7.9%) and L. Stanley Wall (7.9%).

Town Radio, Inc., 26 FCC 2d 44.[3] Only the following issues pertain to Central's application:[4]

(1) To determine all the facts and circumstances surrounding the preparation and filing of the application of the Central Westmoreland Broadcasting Company (formerly Albert A. Calisti & Associates) and the amendments thereto and, in the light of the evidence adduced, whether Albert A. Calisti must be deemed to have an interest in the application of the Central Westmoreland Broadcasting Company.

(2) To determine, if it is concluded pursuant to the foregoing issue, that Albert A. Calisti is a party to the application, and in the light of representations to the contrary and the evidence adduced concerning Calisti's criminal record, whether the Central Westmoreland Broadcasting Company has the requisite qaulifications to be a broadcast licensee.

(3) To determine whether a grant of the application of the Central Westmoreland Broadcasting Company would contravene the Commission's policy requiring divorcement of interests between stations in the same broadcast service and serving substantially the same area.

(4) To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether the application of Central Westmoreland Broadcasting Company should be granted.[5]

The designation Order provided that the burden of proceeding with the introduction of evidence and the burden of proof under the above issues was on the applicant.

2. In an Initial Decision (FCC 71D–91, released November 18, 1971), Administrative Law Judge Isadore A. Honig proposed a grant of Central's application. The Judge concluded that Albert Calisti "need not be deemed to have an interest in the application of Central * * * even though he has been of some assistance to [his wife, Verna Calisti] in the prosecution thereof out of the desire that she should succeed in this endeavor."[6] The proceeding is now before the Review Board on exceptions filed by WHJB. Also before the Board are: a petition for leave to amend, filed October 11, 1972, by Central to reflect, *inter alia*, certain changes in the ownership of property held by Mr. and Mrs. Calisti; and a petition to reopen the record for hearing, filed October 19, 1972, by WHJB, which seeks a remand of the proceeding in order to explore matters contained in Central's amendment.[7] The Board has reviewed the Initial Decision in light of the record, the exceptions and brief in support thereof filed by WHJB, the reply filed by Central, and the arguments of the parties before a panel of the Board on November 9, 1972. In our opinion, the Presiding

[3] The applications of Town Radio, Inc. (Town) and the Laurel Highlands Broadcasting Company (Laurel) were originally designated for consolidated hearing together with that of Central because Central's application was mutually exclusive with the other two. However, the Laurel application was later dismissed for lack of prosecution and the Town and Central applications were severed after it was determined that they were not mutually exclusive.

[4] The wording of Issue 4 has been appropriately revised in light of the fact that Central's application is the only one remaining in this proceeding.

[5] WHJB was made a party to the proceeding by the Commission. Subsequently, Albert Calisti was made a party to the proceeding by Order of the Administrative Law Judge, FCC 70M–1604, released November 23, 1970.

[6] The cross-interest issue was also resolved in Central's favor; however, the proposed grant was made subject to the condition that John Seremet's employment at Station WTRA "be terminated upon commencement of the operation of [Central's] proposed station." No exception has been addressed to this conclusion and the Board will affirm it.

[7] WHJB's petition is entitled "petition to postpone oral argument and reopen the record for hearing." By Order, FCC 72R–132, released November 2, 1972, the Board denied WHJB's request to postpone oral argument and held in abeyance the request to reopen the record. Related pleadings before the Board are: separate comments on Central's petition for leave to amend and on WHJB's petition to reopen the record for hearing, filed by the Broadcast Bureau on October 20 and October 26, 1972, respectively; and an opposition to the petition to reopen, filed on November 1, 1972, by Central.

Judge's findings and conclusions "represent a fair and reasonable interpretation of the record evidence developed in this proceeding." *Radio Enterprises of Ohio, Inc.*, 38 FCC 2d 1099, 1100, 26 RR 2d 519, 520 (1973). Accordingly, except as they are modified herein and in the rulings on exceptions contained in the attached Appendix, those findings and conclusions are adopted. Therefore, in the first part of this Decision, we shall briefly consider and treat the major exceptions addressed to the Initial Decision by WHJB. In the second part of this Decision, we shall deal with Central's petition to amend its application, which we shall grant, and WHJB's request for a reopening of the record for another hearing, which we shall deny.

THE INITIAL DECISION

3. The overriding question in this case is, in essence, whether Albert Calisti is a real party in interest in the Central application. The question arose because Albert Calisti, a former partner, is married to the controlling partner in the applicant, Verna Calisti, who currently owns a 92.1% interest in the partnership. Central had the difficult burden of proving a negative, *i.e.*, that Albert Calisti no longer has an "interest" in the application. It is the Board's view that Central has met its difficult burden of proof in this unusual situation. That is, although there is no question that Albert Calisti was the guiding force behind the formation and filing of the Associates application, the record also shows that he has been effectively removed and has no interest or voice in the Central partnership *or* application. Central has shown that Mr. Calisti has been removed from financial involvement with Central and that Mrs. Calisti acts substantially independently of Mr. Calisti's influences and wishes. Furthermore, Mrs. Calisti has demonstrated her business competence by occupational success in the real estate field; since becoming the controlling partner of Central, *she* has become the guiding force behind the partnership and has vigorously prosecuted its application;[8] and, with the exception of a few isolated incidents, discussed below, she has had no assistance from her husband in prosecuting the application.

4. WHJB challenges many of the inferences and conclusions drawn by the Presiding Judge, especially the conclusion that Albert Calisti is not an undisclosed party in the Central application. It is not disputed that Mr. Calisti was the main force behind Associates' partnership. The dispute between WHJB, on the one hand, and Central, the Bureau, and the Judge, on the other hand, concerns Mr. Calisti's activities *after* his formal withdrawal from the partnership on January 5, 1968, *i.e.*, whether or not Mr. Calisti remained so intimately involved as to retain an undisclosed interest in the partnership, thereby influencing the policy and programming of the station, contrary to representations made to the Commission. In essence, WHJB argues that, by virtue of their marriage, Verna Calisti cannot be considered to be financially independent of Albert Calisti. However, the record

[8] Among other things, Mrs. Calisti secured a $50,000 line-of-credit for the applicant (see paragraph 6, *infra*); obtained new and renewed advertising commitments; purchased property in her own name with her own funds (see paragraph 8, *infra*); located a new transmitter site (see paragraph 7, *infra*); secured an equipment credit letter; hired new legal counsel; and supplied substantial personal funds to the applicant.

shows that, whereas during the early years of their marriage, Mr. Calisti supported the family while Mrs. Calisti worked at various times to help out, around 1959, Mrs. Calisti went back to work, and has been employed full-time since 1961 in the real estate business and has since that time become financially independent of Mr. Calisti.[9] The record also reveals that she has not been influenced at all by him while pursuing her career in real estate; that she maintains her own bank account from which she pays her own expenses; that she has, from her own savings, been able to purchase property in her own name; and that she has secured a $50,000 loan for the applicant, using her own assets as collateral. See paragraph 6, *infra*. Mrs. Calisti has always segregated her income, and, after helping out with family expenses, as needed, her income was considered her own. In fact, when contemplating applying for a radio station, Mr. Calisti approached Mrs. Calisti regarding the need for *her* financial assistance. She agreed that most of the money would come from her income and most of it has.

5. However, the first $3,000 expended on the application was a gift from Albert Calisti's parents. When he withdrew from the application, Mr. Calisti did not request to be reimbursed for his contribution. As WHJB points out, this was unlike Mr. Wall who recouped his $5,000 investment when he withdrew. Since the Calistis considered one-half of the gift to be Mrs. Calisti's, the issue involves $1,500. In the Board's opinion, Mr. Calisti's share (or $1,500) left in the partnership as a gift to Mrs. Calisti cannot be considered to give Mr. Calisti a financial interest or voice in the station. *Cf. WLOX Broadcasting Co.* v. *FCC*, 140 U.S. App. D.C. 194, 260 F.2d 712, 17 RR 2119 (1958); *Heitmeyer* v. *FCC*, 68 U.S. App. D.C. 180, 95 F.2d 91 (1932). Therefore, it cannot be concluded that Albert Calisti obtained an interest in the applicant by virtue of his $1,500 gift to his wife. *Cf Medford Broadcasters, Inc.*, 16 FCC 2d 684, 15 RR 2d 780 (1969); *Michael S. Rice*, 9 FCC 2d 217, 10 RR 2d 965 (1967). A gift from husband to wife, particularly under the circumstances here relating to Mr. Calisti's past difficulties, as noted above in paragraph 1, is not suspect. *Cf Medford Broadcasters, Inc.*, 34 FCC 2d 989, 24 RR 2d 359 (1972).

6. WHJB also relies on the fact that in July, 1968, after he withdrew from the partnership, Albert Calisti signed a judgment note to secure a bank loan to the applicant. The circumstances at the time were that Verna Calisti was attempting to disassociate her husband from any financial responsibility to the applicant. Accordingly, Mrs. Calisti negotiated a $50,000 loan from the Commercial Bank and Trust Company (a loan which Mr. Calisti was unable to negotiate on behalf of the Assoicates partnership). As security for the loan, Mrs. Calisti pledged her own property, which, until three days prior to the loan commitment, had been jointly owned by both Calistis. Mr. Calisti, however, was still liable on some of the mortgages; therefore, the bank, because of its collateral requirements plus the curtesy laws of the Commonwealth of Pennsylvania, required his signature on a judgment note in July, 1968. In order to eliminate any adverse inference which these circumstances might create, *i.e.*, that Mr. Calisti had again ob-

[9] Mrs. Calisti's income as a real estate broker has increased progressively each year, reaching $12,646 in 1970.

tained a substantial financial interest in the applicant, Mrs. Calisti renegotiated the loan so that she would be the only person guaranteeing the line-of-credit. Thus, *at the time of the hearing*, the loan was secured solely by Mrs. Calisti and her individual assets, which included three pieces of property, two of which Mrs. Calisti purchased individually, and one which had been originally held jointly by the Calistis.[10]

7. Finally, Albert Calisti's role with respect to the so-called "Stewart property" (owned by Robert, Sara and Paul Stewart) must be considered. The Stewart site was the one upon which the original Associates partnership proposed to locate its transmitter.[11] When he was a partner in the Associates applicant, Albert Calisti had negotiated a lease on the property. The lease, which was signed on February 8, 1967, had two options, one to purchase and one to extend the lease for another year. On January 8, 1968, only three days after the formal dissolution of the Associates partnership, Albert Calisti, as an individual, signed an extension agreement with the Stewarts providing for a seven-month extension at an increased rental. The Calistis both testified that this was done because they feared losing the property to another purchaser who was interested at the time and to whom the Stewarts allegedly wanted to sell. Interestingly, the other purchaser turned out to be Melvin Goldberg, president of WHJB, one of the parties to this case. See paragraph 1, *supra*. Goldberg testified that he wanted the Stewart property because WHJB's head-end for a CATV system is located less than a mile from the Stewart property and Goldberg was concerned about the interference a radio tower would cause to the head-end.

8. There is disagreement in the Calistis' testimony as to the facts leading up to Mr. Calisti's signing of the extension agreement regarding whether Mrs. Calisti requested Mr. Calisti to negotiate the lease extension, although he was no longer a partner in the application, or whether Mr. Calisti took it upon himself to extend the lease. The Presiding Judge concluded that Mrs. Calisti's version of the facts—that Mr. Calisti acted at her urging—was more accurate and although we have no difficulty in affirming the Judge's view of the testimony, we believe it is decisionally insignificant as to whether Mr. Calisti signed the extension on his own initiative or at Mrs. Calisti's request. The record amply supports the finding that the Calistis, regardless of their legal rights, genuinely feared losing the Stewart property to Goldberg. Moreover, Mr. Calisti, who it must be remembered negotiated the lease in the first place, was not yet so far removed (only three days) from the application that it would have been unreasonable for him to have negotiated the extension agreement.[12] Significantly, however, six months later, on June 27, 1968, Verna Calisti purchased the Stewart property in her own name and with her own funds. Despite

[10] See paragraph 10, *infra*.

[11] Mrs. Calisti, after subsequently deciding that the original proposed antenna site was unacceptable, hired a photographer to take pictures of a new site. The photographer dealt only with her and she subsequently arranged for an option to purchase the property and a later extension, both in her own name, not Central's. The owners of the property never dealt with Mr. Calisti, but with Mrs. Calisti. All of these facts are undisputed.

[12] In the brief accompanying its exceptions, WHJB attempts to contrast Mr. Calisti's activities subsequent to withdrawal to those of Mr. Wall after his withdrawal. However, Mr. Calisti had been the guiding force in Associates and married to the dominant partner in Central whereas Mr. Wall was only a minor partner and owner in Central.

her continued apprehensions about loss of the property, Mr. Calisti was not in the least involved in the purchase. The Board believes, therefore, that the Presiding Judge correctly concluded that Mr. Calisti's holdover act of January 8, 1968, did not give him an undisclosed interest in the Central application.[18]

9. In sum, it is the Board's view that Central has shown that Albert Calisti retained no financial interest in or policy control over the applicant after his formal withdrawal on January 5, 1968. Although WHJB has posited that a "pattern" of conduct existed which inextricably tied Albert Calisti to the Central application, the answer is that the record does not bear out any such pattern, but only isolated and explained instances of Albert Calisti's involvement. Compare *Voice of Reason, Inc.* (KICM), 37 FCC 2d 686, 25 RR 2d 645 (1972), reconsideration denied FCC 73R–84, released February 23, 1973. WHJB's condemnation of Albert Calisti's "overall efforts" on behalf of Central is similarly misleading in that his efforts, as shown in the foregoing paragraphs, were actually very few in number. We therefore agree with the Presiding Judge that Central has actually and successfully removed Albert Calisti from the application, and conclude that the Initial Decision should be affirmed. The only remaining questions, then, concern Central's petition for leave to amend and WHJB's petition to reopen the record for hearing, to which we now turn.

THE PETITIONS FOR LEAVE TO AMEND AND TO REOPEN THE RECORD

10. In its petition for leave to amend, Central recites the following: On June 16, 1972, pursuant to Section 1.65 of the Commission's Rules, Central notified the Commission by letter that Verna Calisti had, on May 18, 1972, filed a complaint in divorce from Albert Calisti in a Pennsylvania court. On August 11, 1972, Central advised the Commission by letter that certain real property owned by Verna Calisti individually at the time of the hearing had been transferred to Verna and Albert Calisti, as joint owners. By letter, dated August 21, 1972, the Bureau requested Central to explain by way of amendment the property transfers, the date on which the transfers occurred, and the effect on Mrs. Calisti's financial status. The amendment attached to Central's petition contains the following: a balance sheet of Central's, dated September 8, 1972; a balance sheet of Verna Calisti's of the same date; an extension of the option to purchase the property proposed to be used by Central as its transmitter site; and three statements, two from the Commercial Bank and Trust Company and one from Verna Calisti. The first two statements, dated June 6 and July 7, 1972, respectively, are from the bank and acknowledge the bank's awareness of the divorce action and the property transfers. The letter of June 6 recites that the bank's decision to lend $50,000 to Central was not affected by recent events, since Verna Calisti has always been considered to be the borrower, and the July 7 letter states that the bank has reviewed the collateral situation and concluded that it shows enough strength *with-*

[18] At oral argument, WHJB urged that the fact that the extension was notarized by Mrs. Calisti is inconsistent with her version of the events leading up to the signing of the extension. However, the Board fails to perceive the significance of the fact or why it is inconsistent with the contention that Mr. Calisti negotiated the extension because of the fear that others would not be successful.

out reliance on the real estate,[14] and that the line-of-credit for $50,000 is still available to Verna Calisti. In her statement, Verna Calisti claims that she decided to transfer the properties to her husband and herself after she filed for divorce in order to reduce the likelihood of a contested divorce. She states that her children are of legal age, and, as far as she knows, the only things subject to a settlement as part of her divorce would be the real estate. Therefore, to avoid appearing unreasonable or unfair and to avoid a bitter divorce action, she and Mr. Calisti agreed at the time the properties were transferred to place the real estate on the market and share equally in the proceeds. The real estate, she continues, was transferred on May 23, 1972. Mrs. Calisti further recites that on June 30, 1972, her son lost part of his leg in an accident, and on July 24, 1972, her brother-in-law died. These personal misfortunes and related concerns caused delays in the divorce action and, on September 26, 1972, Mrs. Calisti concludes, she and her husband agreed to a reconciliation.

11. In its comments, the Bureau takes the position that the proposed amendment should be accepted. It is appropriate, the Bureau urges, to permit Central to inform the Commission of the transfer of the real properties inasmuch as the ownership of these properties was considered in the resolution of the undisclosed principal issue. The information contained in the balance of the amendment also is properly reported, the Bureau states, in order to keep the application current. However, the Bureau contends, the propriety of the amendment does not obviate the need for additional hearing. Indeed, the Bureau argues, the property transfer has a direct bearing on previous representations made by the Calistis and, in the Bureau's view, requires a remand for further hearing.

12. In its petition to reopen the record for further hearing, WHJB contends that remand is required to explore three matters: (a) the reasons for the reversion of the ownership of the real estate to the Calistis jointly and the effect on Central's candor; (b) the nature of the collateral now relied upon by the bank to secure the $50,000 loan; and (c) the reason Central delayed three months in reporting the change of ownership in the real estate. With respect to the first point, WHJB initially notes that the Commission, in its designation Order, expressed concern that there may be an undisclosed understanding with respect to the true ownership of the real estate.[15] Moreover, WHJB contends, evidence developed at the hearing confirms the Commission's concern in that a question was raised as to why no gift tax return had been filed with respect to the supposedly irrevocable gift of property from Albert to Verna Calisti on July 22, 1968. WHJB suggests that a similar question exists as to the May, 1972, property transfer. Mrs. Calisti's explanation of the recent transfer, WHJB continues, is reminiscent of her explanation of her temporary decision in July, 1969, to transfer the property back to joint ownership and reinstate

[14] Other collateral for the loan includes: interest and non-interest bearing certificates of deposit totalling $20,000; and a life insurance policy on Verna Calisti's life in the amount of $32,000.

[15] See paragraph 10 of the designation Order, 26 FCC 2d at 47.

Albert Calisti in the Central application.[16] According to WHJB, Mrs. Calisti testified that she would not execute a similar agreement again. However, with the recent amendment and reconciliation, WHJB contends, the situation is substantially what it was before the hearing and further exploration of the property transfers is therefore required.

13. With respect to the loan commitment, WHJB argues that the collateral underlying the $50,000 loan has been reduced. Specifically, it asserts that the bank in its letter submitted with the Central amendment, has apparently agreed to release collateral approximating a net value of $26,000[17] without explanation, and that nothing in Mrs. Calisti's September 8, 1972 balance sheet would support such a loan commitment. That is, WHJB argues that other security for the loan consisted of two $10,000 certificates of deposit and Verna Calisti's life insurance; however, WHJB points out, the recent balance sheet lists one certificate of deposit at a value of $5,000 without explanation for the decrease, and a cash value of life insurance of only $315. In these circumstances, WHJB argues, testimony of a bank official is required. Finally, WHJB points out that although the land in question was reconveyed on May 23, 1972, this fact was not reported until August 11, 1972, almost three months later, and subsequent to Central's letter of June 16, 1972, reporting the pending divorce action. The significance of the property transfer has been at issue throughout, WHJB submits, and therefore should have been timely reported in accordance with Rule 1.65. In sum, WHJB contends, a reopening of the record is required to explore all the matters it raises.

14. In its comments, the Bureau agrees with WHJB that a remand is necessary, albeit on more limited grounds. The Bureau asserts that the recent property transfers raise questions concerning the representations made by the Calistis at the hearing. Specifically, the Bureau contends, both Calistis testified that the original transfer of the properties from joint ownership to Mrs. Calisti individually was an irrevocable gift; the retransfer therefore raises questions concerning the finality of the original transfer and necessitates further hearing. The Bureau does not, however, agree with WHJB that inquiry into the continued availability of the bank loan is required. The Bureau points out that the bank has indicated its willingness to continue the commitment despite the reduction in collateral and that this fact obviates need for further inquiry. The Bureau also disagrees with WHJB on the need for a Rule 1.65 inquiry. Although it believes the property retransfer should have been timely reported, the Bureau is of the view that no new issue is required because the transfers were voluntarily reported by the applicant prior to any action by the Review Board. In these circumstances, the Bureau would have us remand the proceeding only for the limited purposes indicated.

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[16] At the hearing, Mrs. Calisti testified that at the time she and her husband signed this hand written agreement, they were experiencing marital difficulties, had discussed a divorce, and that she was under pressure from her children who felt she had taken advantage of their father. On the same day, however, Mrs. Calisti asked for return of the agreement, saying she could not agree to its terms without Mr. Seremet's approval. The next day (July 23, 1969), she succeeded in having Mr. Calisti surrender the agreement to her. See paragraph 43 of the Initial Decision. See also paragraph 18, *infra*.

[17] The value of the real estate originally accepted as collateral totals $42,400 and the mortgages thereon total $16,399 according to a schedule submitted with the Central amendment.

15. In its opposition, Central alleges that WHJB has continually opposed the Central application and that of its predecessor on the basis of its economic interests as a broadcast licensee in Greensburg, Pennsylvania, an area which would be served by Central's proposed station.[18] Central contends that WHJB has fostered delay at various times throughout this proceeding and that further delay would only serve WHJB's economic interests. Moreover, Central argues that neither WHJB nor the Bureau have supported their requests for remand with affidavits or other materials which would tend to negate the conclusions reached by the Presiding Judge in his Initial Decision.[19] With respect to the property transfers, Central contends that the filing and subsequent retraction of the divorce suit is immaterial to the wording of the real party in interest issue herein (Issue 2); indeed, the Presiding Judge concluded that Mr. Calisti had no interest in the Central application prior to the filing of the divorce action and found that the property ownership did not indicate a hidden interest in Mr. Calisti. Central points out that the Judge stressed Mrs. Calisti's occupational success, her capable prosecution of the Central application and her effective presentation of testimony in concluding that she had become financially and professionally independent of her husband and that he had no undisclosed interest in the applicant. Central submits that Mrs. Calisti's subsequent domestic misfortunes can have no bearing on the conclusions regarding her independence. With respect to the collateral for the bank loan, Central contends that no further inquiry is called for because there is no financial issue in the proceeding and the bank's *bona fides* cannot be questioned. In this regard, Central states that the bank is fully aware of the property transfer and divorce action and has confirmed its commitment. Moreover, Central argues, WHJB has produced no reason for the inquiry or evidence that the commitment is not firm. Central also opposes the addition of a Rule 1.65 issue. That Central intended no concealment is apparent, it argues, from the fact that it voluntarily reported the transfer to the Commission. Furthermore, Central contends, in a single applicant proceeding, no competitive disadvantage due to lack of knowledge is possible as a result of Central's inadvertent failure to update its application. In these circumstances, Central opposes a remand for further hearing.

16. It is the Board's opinion that the petition for leave to amend should be granted, the amendment accepted, and the petition to reopen the record denied. Acceptance of the content of the amendment is not opposed by any of the parties and we believe the updated balance sheets, the purchase option extension, the bank letters and Mrs. Calisti's personal statement are relevant, properly reported, and that good cause exists for their receipt. See Section 1.522 of the Rules. The controverted issue concerns the propriety of remand in the circumstances before us.

17. Specifically, WHJB and the Bureau question whether the recent retransfer of properties from Verna Calisti to the Calistis jointly

[18] It is noted that Jeannette, Central's proposed city of license, is only about four miles from Greensburg.

[19] It is noted that the Bureau did not file a formal request for remand, but, in its comments and at oral argument, supported WHJB's request for a remand.

raises such a serious question about the truthfulness of Mrs. Calisti's representations at the hearing with regard to the original property transfer to her on July 22, 1968, that a further hearing is required to reach a resolution of the matter. It is our view that such a question has not been raised. Mrs. Calisti's explanations have been consistently credible at the hearing and in the pleadings before us. The Judge, who observed her, decided in his discretion that she was telling the truth, and we believe no showing of abuse of his discretion has been made so as to warrant disturbing his findings. *Cf. Lebanon Valley Radio, Inc.*, 35 FCC 2d 243, 257–8, 24 RR 2d 586, 603–4 (1972), review denied FCC 73–226, released March 6, 1973. Furthermore, the Presiding Judge devoted an entire paragraph of his findings (paragraph 53) to Mrs. Calisti's "reputation for truthfulness in the community" and no exceptions have been taken to this paragraph. In like manner, the recent property retransfer reported in Central's amendment is fully explained, and Mrs. Calisti's statement that the purpose was to facilitate her divorce is not inherently improbable or unworthy of belief. Moreover, the Calisti reconciliation, in light of the recent history of personal tragedy the family has experienced, is entirely plausible. The picture which comes through clearly is that of a person attempting to achieve and preserve her independence in a business venture while struggling with marital and family problems which make attainment of that goal more difficult. Had misrepresentation or deception been Mrs. Calisti's purpose, other far easier ways to reach it were available as compared with what has occurred here.

18. It seems to us that further hearing at this point would only serve to re-try what is already known or to explore collateral matters. This is, of course, insufficient justification to reopen the record. See *La Fiesta Broadcasting Company*, 2 FCC 2d 255, 6 RR 2d 884 (1965). For example, WHJB's argument regarding the filing of gift tax returns seems clearly beside the point.[20] Likewise, WHJB's reliance on Mrs. Calisti's tesimony concerning her husband's attempt in 1969 to pressure her to transfer the properties back to joint ownership is misplaced. First, the surrounding circumstances are fully explained on the record. Second, we agree with the Presiding Judge that the July, 1968 transfer of the properties to Mrs. Calisti alone was "an outright gift" and that the testimony confirms this. (See paragraph 15 of the Judge's conclusions.) Finally, and most important, as indicated above, Mrs. Calisti's current circumstances have changed and her explanation that person tragedies have motivated the recent property transfers is credible. The facts revealed by the latest amendment relating to the property retransfer, the financial arrangements, and Mrs. Calisti's explanations for these changes, when reviewed together, do not leave the question of Mrs. Calisti's independence in the operation of the proposed station seriously in doubt; stated another way, when taken as a whole as must be done when deciding whether remand is necessary, they are not inherently inconsistent with the totality of the facts developed at the hearing and on which the Judge reached his conclusion concerning Mrs. Calisti's independence.

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[20] As the Presiding Judge correctly concluded, Mrs. Calisti's failure to file a federal gift tax return "in no way evidences an intent that Mr. Calisti is to share in the ownership of the proposed station."

19. The recent pleadings only serve to refocus attention on the major difficulty originally presented by this case; that is, where a principal withdraws from an application but remains married to the dominant principal how does the applicant show that the withdrawing principal has no undisclosed interest or undue influence over the applicant. Recently, in dealing with a family relationship in a real party-in-interest case, the Commission, in *Medford Broadcasters, Inc., supra*, 34 FCC 2d 989, 24 RR 2d 359, reversed the Administrative Law Judge's conclusion that a father was an undisclosed owner in his son's station. The Commission held, *inter alia:*

> ***The close family relationship which exists here must be accorded considerable decisional weight since arrangements which might be most unusual, and therefore questionable, as between related persons are reasonable and perfectly natural as between a father and son.*** Thus, both Hansens have maintained throughout this proceeding that while all of the financial backing for the station was provided by the father, they have always considered their past financial arrangements for the initial purchase and subsequent operation of Station KCNO as constituting a bona fide loan which the son is obligated to repay from the station's profits; and we find no reason to disbelieve this testimony. The record clearly establishes the father's desires and attempts to steer his son into the broadcasting field and their financial arrangement was apparently in furtherance of the father's objective. 34 FCC 2d at 993, 24 RR 2d at 365. (Emphasis supplied.)

In *Medford*, there was a large financial dependency by the son on the father involving a loan of a substantial amount of money. Although such a financial commitment is not present here, other factors, such as the property transfers, are present, and we believe the Commission's language regarding such arrangements involving close family relationships has equal significance in this case. *Cf. Corvallis Broadcasting Corp.*, 38 FCC 2d 30, 25 RR 2d 824 (1972); *Michael S. Rice*, 9 FCC 2d 217, 10 RR 2d 965 (1967). In short, family problems have plagued Mrs. Calisti throughout this proceeding; she has endeavored to explain the history of property transfers in relation to those problems; and it is our belief that her explanations are believable.

20. WHJB's other arguments in support of a remand for further hearing are likewise unpersuasive. The letters from the lending bank submitted with Central's amendment express satisfaction with the collateral for the $50,000 loan and thus negate WHJB's contentions that the collateral, which consists of *no* jointly held property, is insufficient and that the testimony of a bank official is necessary. It is well established that an applicant is required to provide "reasonable assurance" of the availability of a bank loan; and a bank commitment letter has traditionally been accepted as satisfying this standard. *Tri-City Broadcasting Co.*, 35 FCC 364, 1 RR 2d 81 (1963); *Lamar Life Broadcasting Co.*, 21 FCC 2d 112, 20 RR 2d 509 (1970). Absent a showing which questions the validity of the letter or the bank's ability to make the loan, such a letter is sufficient, *McCreary Broadcasting Corp.*, 27 FCC 2d 964, 21 RR 2d 321 (1971); and WHJB has not shown either that the letters are invalid or that the bank cannot or will not make the loan. With respect to the argument that the reconveyance of the property was not promptly reported in accordance with Rule 1.65, we are in substantial agreement with the position taken by the Bureau. The facts should have been reported within thirty days of their occur-

rence. However, Central voluntarily reported the transfer; it claims inadvertence, and we have no reason to believe otherwise; and the request for a remand to explore the Rule 1.65 question was made after the voluntary reporting of these events. In these particular circumstances, we do not believe a Rule 1.65 inquiry is warranted. *Cf. Media, Inc.*, 22 FCC 2d 486, 18 RR 2d 970 (1970); *Harrison Radio, Inc.*, 22 FCC 2d 157, 18 RR 2d 814 (1970); *Lester H. Allen*, 17 FCC 2d 439, 16 RR 2d 19 (1969). Compare *Athens Broadcasting Company, Inc.*, 37 FCC 2d 374, 25 RR 2d 483 (1972).

21. This proceeding has been a long protracted one; Central's application has been pending for nearly six years since the original filing on March 28, 1967. We believe the questions WHJB has raised have been adequately answered by the applicant at the hearing and more recently in its proposed amendment. The public interest in administrative finality weighs heavily in favor of a decision without further delay. *Valley Telecasting Co.* v. *FCC*, 118 U.S. App. D.C. 410, 413, 336 F. 2d 914, 917, 2 RR 2d 2064, 2068 (1964). See *Athens Broadcasting Company, Inc., supra*, 37 FCC 2d at 384, 25 RR 2d at 495. In sum, it is our view that WHJB has not satisfied a crucial aspect of the well settled test for reopening a hearing record; that is, it has not shown that the new matter contained in the amendment would affect the outcome of this proceeding. See *Lorain Community Broadcasting Co.*, 11 FCC 2d 794, 12 RR 2d 344 (1968); *La Fiesta Broadcasting Company, supra*. For all the foregoing reasons, WHJB's request for further hearing must be denied.[21] And, it must be held that a grant of Central's application would serve the public interest, convenience and necessity.[22]

22. ACCORDINGLY, IT IS ORDERED, That the petition to reopen the record for hearing, filed October 19, 1972, by WHJB, Inc. IS DENIED; and

23. IT IS FURTHER ORDERED, That the petition for leave to amend, filed October 11, 1972, by Central Westmoreland Broadcasting Company IS GRANTED and the amendment contained therein IS ACCEPTED; and

24. IT IS FURTHER ORDERED, That the application of Verna M. Calisti and John K. Seremet, d/b as Central Westmoreland Broadcasting Company (BP–17690) for a construction permit for a new standard broadcast station at Jeannette, Pennsylvania, IS GRANTED, subject to the condition that the employment of John K. Seremet at Station WTRA be terminated upon commencement of operation of the proposed station.

DONALD J. BERKEMEYER,
Member, Review Board,
Federal Communications Commission.

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[21] Compare *DuPage County Broadcasting, Inc.*, 21 FCC 2d 395, 18 RR 2d 321, reconsideration denied 23 FCC 2d 22, 19 RR 2d 568 (1970), where the Commission reversed a Board Order (16 FCC 2d 899, 15 RR 2d 1009 (1969)) denying a request to remand and reopen the record after the Initial Decision had been issued. In that case, the Commission rejected the contention that the petitioner had not proceeded with due diligence and emphasized that substantial allegations of specific rule violations were involved. *Cf. Athens Broadcasting Company, supra.*

[22] In view of our determination that Central has met its evidentiary burdens under Issue (1), we need not resolve Issue (2), which is dependent on an adverse resolution of Issue (1).

APPENDIX

Rulings on Exceptions filed by WHJB, Inc.

Exception No.[1]	*Ruling*
2	*Granted.* Official notice is taken of the filing dates of the parties' proposed findings; and paragraph 4 of of the Preliminary Statement of the Initial Decision is corrected accordingly.
4, 11	*Denied.* The Presiding Judge's findings accurately and adequately reflect the record. The additional findings requested by WHJB would add nothing of decisional value to the resolution of the issues.
8, 36	*Granted* to the extent that Mrs. Calisti did wish to retain majority ownership in the partnership.
9	*Denied.* This exception misstates the record. On the very page following those cited in the transcript by WHJB in support of its exception Mr. Seremet corrected himself to indicate he was speaking of Mr. Wall, *not* Mr. Calisti. See Tr. 458–460.
14	*Denied* for the following reasons: (1) the Presiding Judge correctly relied on the testimony in question as establishing the facts on the point; and (2) the requested additional findings were in fact made by the Presiding Judge at paragraph 30 of the findings of fact.
16, 24, 25	*Denied.* These exceptions essentially quarrel with the Presiding Judge's reliance on Mrs. Calisti's testimony as fact. For the reasons stated in paragraphs 17–18 of this Decision, we believe that the Presiding Judge did not abuse his discretion in accepting her testimony.
17, 37	*Granted* to the extent that the record reflects an apparent misunderstanding as to whether Mr. Calisti would be chief engineer or merely a consultant at Central's proposed station; *denied* in all other respects because the Presiding Judge correctly found that Central, after being convinced that Mr. Calisti should not be retained in even the slightest capacity, amended its application on August 7, 1968, to eliminate Mr. Calisti as an employee of the proposed station. We need not take official notice of the material requested because the record already reflects the pertinent information.
18	*Denied.* The Judge did not abuse his discretion in ruling that the affidavits of two persons not present at the hearing who allegedly contradicted Mrs. Calisti's testimony were inadmissible because WHJB refused to produce the affiants for cross-examination. Moreover the Presiding Judge merely found that Verna Calisti "reports" that the Jeannette City Council agreed to support Central's application. He did not accept her testimony as fact. As for the testimony itself, it is not unbelievable and, in any case, not decisionally significant.
23, 44, 45	*Denied* for the reasons stated in paragraphs 17–18 of this Decision.

[1] Contrary to the customary practice, WHJB has keyed its exceptions to the paragraphs in its pleading, including those which contain no exceptions, instead of simply numbering its exceptions consecutively. Although its method had added unnecessary confusion and does not warrant our approval, we have nevertheless listed the exceptions in accordance with WHJB's numbering scheme. *Cf. Coral Television Corporation (WCIX–TV)*, 29 FCC 2d 266, 283, 21 RR 2d 1114, 1132 (1971).

Exception No.	*Ruling*
27	*Granted* to the extent indicated in footnote 9 to this Decision; *denied* in all other respects as being of no decisional significance.
29, 30, 31	*Denied* for the following reasons: (1) the exceptions do not comport with the particularity requirements of Section 1.277(a) of the Commission's Rules, but rather consist of several pages of WHJB's proposed findings (see *American Telegraph and Telephone Company*, FCC 72–1128, released December 19, 1972; *Dolph-Pettey Broadcasting Co.*, 35 FCC 538, 1 RR 2d 347 (1963); *Veteran Broadcasting Co., Inc.*, 29 FCC 1105, 1107 (1960); *Coral Television Corporation (WCIX–TV), supra*); (2) the material is cumulative and argumentative; (3) the Presiding Judge's findings are accurate and adequate; and (4) the proposed additional findings would add nothing of decisional value to the resolution of the issues.
34	*Denied* in substance. See paragraph 4 of this Decision.
35	*Denied.* The Presiding Judge's conclusions correctly reflect the record. (See Tr. 215–17, 344–46, 453–58, 518–21.)
39	*Denied* for the reasons stated in paragraph 5 of this Decision and for the reasons stated in our ruling on Exception No. 9, *supra.*
40, 41	*Denied* in substance for the reasons stated in paragraphs 5, 6 and 9 of this Decision.
42	*Denied.* We agree with the Presiding Judge that, even if Mr. Calisti made rent payments of $60, this would not support an inference that he maintained an interest in the partnership or in the application. In any event, the matter is not of decisional significance.
43	*Denied.* See paragraph 6 of this Decision.
46	*Denied.* The record establishes that all of Central's financial arrangements with the Commercial Bank and Trust Company from 1968 to the present have been handled solely by Mrs. Calisti. Furthermore, Mrs. Calisti's earning and use of her personal funds in connection with the application is well established (see paragraph 4 of this Decision). Finally, we believe that after he left the original Associates partnership, Mr. Calisti's activities on behalf of Central were properly analyzed in context by the Presiding Judge. See paragraphs 4–9 of this Decision.
47	*Denied* for the reasons stated in paragraphs 3–10 of this Decision.
48	*Denied* for the reasons stated in paragraphs 3, 4, 6, 17 and 18 of this Decision.
49, 51, 52	*Denied* for the reasons stated in the whole of this Decision.[2]

[2] In paragraphs 6, 12 and 19 of its so-called "exceptions", WHJB, without taking specific exceptions to any portion of the Initial Decision or ruling by the Presiding Judge, argues generally that the Judge failed to consider the matter in question in the overall context of the record. Such arguments are clearly contrary to the provisions of Rule 1.277(a) and, as such, are rejected. See ruling on Exceptions Nos. 29–31, *supra*, and cases cited therein. The matters contained in these paragraphs are argumentative and should have been included in WHJB's brief accompanying the formal exceptions rather than as part of the exceptions themselves.

F.C.C. 71D-91

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of VERNA M. CALISTI AND JOHN K. SEREMET, D.B.A. CENTRAL WESTMORELAND BROADCASTING CO., JEANNETTE, PA. For Construction Permit	Docket No. 19042 File No. BP-17690

APPEARANCES

Don E. Bilger, Esq., on behalf of Central Westmoreland Broadcasting Company; *Thomas Schattenfield, Esq.*, on behalf of WHJB, Inc., *Arthur V. Weinberg, Esq.*, on behalf of Albert A. Calisti; and *Gerald M. Zuckerman, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ISADORE A. HONIG

(Issued November 16, 1971; Released November 18, 1971)

PRELIMINARY STATEMENT

1. The application of Verna M. Calisti and John K. Seremet, d/b as Central Westmoreland Broadcasting Company (Central), seeks a construction permit for a new standard broadcast station in Jeannette, Pennsylvania, to operate on a frequency of 1530 kc, with power of 1 kw (250 watts, Critical Hours), daytime only. Originally, the Central application was designated for hearing in a consolidated proceeding together with the applications of: Town Radio, Inc. (Town), for a daytime station on 1530 kc at McConnellsburg, Pennsylvania; and the application of Laurel Highlands Broadcasting Company (Laurel), for a daytime station on 1530 kc at Ligonier, Pennsylvania.[1] WHJB, Inc., licensee of Stations WHJB (AM) and WOKU-FM, Greensburg, Pennsylvania, which had filed petitions to deny the Central application for a Jeannette station, was made a party to the consolidated proceeding in the designation order. By an order of the Hearing Examiner (FCC 70M-1604), released November 23, 1970, Albert A. Calisti was also made a party to the proceeding upon an intervention petition filed by him on November 5, 1970, with his participation being limited to Issues 2 and 3 which are set forth below.

2. The Laurel application for a Ligonier station was dismissed with prejudice for lack of prosecution by order of the Examiner (FCC 70M-1699), released December 11, 1970. Next, the two remaining applications were severed by an order of the Examiner (FCC 70M-1735), released December 21, 1970, in response to a joint motion for

[1] The Commission's designation order in the consolidated proceeding is identified as FCC 70-1090, released October 13, 1970.

severance filed December 7, 1970, after it was ascertained from field intensity measurements taken subsequent to release of the designation order that the McConnellsburg and Jeannette applications are not mutually exclusive.

3. Eight issues were specified for the consolidated proceeding on the three applications involved therein.[2] From among those issues the following affecting the Central application must be resolved in the present proceeding.

> "2. To determine all the facts and circumstances surrounding the preparation and filing of the application of the Central Westmoreland Broadcasting Company (formerly Albert A. Calisti & Associates) and the amendments thereto and, in the light of the evidence adduced, whether Albert A. Calisti must be deemed to have an interest in the application of the Central Westmoreland Broadcasting Company.
>
> "3. To determine, if it concluded pursuant to the foregoing issue, that Albert A. Calisti is a party to the application, and in the light of representations to the contrary and the evidence adduced concerning Calisti's criminal record, whether the Central Westmoreland Broadcasting Company has the requisite qualifications to be a broadcast licensee.
>
> "4. To determine whether a grant of the application of the Central Westmoreland Broadcasting Company would contravene the Commission's policy requiring divorcement of interests between stations in the same broadcast service and serving substantially the same area.
>
> "8. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether the application of Central Westmoreland Broadcasting Company should be granted.[2a]"

The designation order provides that the burden of proceeding with the introduction of evidence and the burden of proof with respect to Issues 2, 3 and 4 shall be upon Central.

4. A prehearing conference in the consolidated proceeding was held on November 24, 1970; the hearing on Central's application was held on January 4, 5, 6, 12, 13 and 14, and on February 9 and 10, 1971, with the record being closed by Order (FCC 71M–337), released March 3, 1971, upon receipt of Central's Exhibit 23. The record was reopened for receipt of Central's Exhibit 24 by an Order (FCC 71M–722), released May 10, 1971; it was again closed by an Order (FCC 71M–795), released May 21, 1971, upon receipt of Central Exhibits 25 and 26. Proposed findings of fact and conclusions were filed by Central and the Broadcast Bureau on June 2, 1971, and by WHJB, Inc. on June 3, 1971. Replies were filed by Central and by WHJB, Inc. on July 9, 1971.

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[2] The Review Board, by an Order (FCC 71R–38), released February 2, 1971, in the above-captioned proceeding, denied a petition filed November 2, 1970, by WHJB, Inc., for the addition of a financial qualifications issue against Central.

[2a] The wording of Issue 8 has been appropriately revised since Central's application is the only one now involved in this proceeding.

FINDINGS OF FACT

Filing of Calisti and Associates Application

5. Albert A. Calisti and Verna Calisti are husband and wife. They reside in Greensburg, Pennsylvania (Tr. 175). On March 30, 1967, a partnership known as Albert A. Calisti and Associates filed an application for a new standard broadcast station in Jeannette, Pennsylvania. The partnership consisted of Albert A. Calisti (42.1%), his wife Verna Calisti (42.1%), L. Stanley Wall (7.9%) and John K. Seremet (7.9%) (Tr. 177–78).

Interest of the Calistis in Obtaining Station

6. Albert Calisti had been employed in radio since 1949 except for several intermittent years. Mrs. Calisti developed an interest in the field because of her husband's association with it. As early as 1950 Mrs. Calisti wanted him to obtain an ownership interest in a station. In 1966 Mr. and Mrs. Calisti were interested in purchasing WTRA, Latrobe, Pennsylvania, through a bankruptcy sale. A third individual was to have a one-half interest. Both Mr. and Mrs. Calisti attended the sale but the attempt to purchase WTRA was not successful. The Calistis, as between themselves, had not discussed the manner in which they would own their half of WTRA (Tr. 186–193).

7. At about the same time that the Calistis were interested in WTRA, they discussed whether they should invest money in having a frequency search made (Tr. 192). Two searches were made and a frequency was found. (Tr. 194).[2b] In the latter part of 1966, Mr. Calisti sought information from the FCC, hired Washington counsel and an engineer (Tr. 194–197). Mr. and Mrs. Calisti started filling out an application (Tr. 198–199). Wall and Seremet were not yet involved but were later to become involved because of financial consideration (Tr. 200).

Preparation of Calisti and Associates Application

8. Mr. Calisti approached several people in his attempt to interest others to join in the application. He had first met Mr. Seremet in 1960. In early 1967 he asked Seremet to join in the venture. Mr. Seremet had met Mrs. Calisti in 1965. He had been employed in broadcasting since 1956, and has been with Station WTRA, Latrobe, Pennsylvania, since 1966. L. Stanley Wall, the general manager of Station WTRA in Latrobe, Pennsylvania, had known both Mr. and Mrs. Calisti since 1962, and was approached by Mr. Calisti one or two months before the application was filed and was asked to join the group (Tr. 200–203, 333, 439). It was Mr. Calisti who arranged for the Calisti Associates partnership articles to be drawn up by Howard Whitehead, a local attorney (Tr. 129) whom Mrs. Calisti had previously employed (Tr. 493).

9. The application filed by Albert A. Calisti and Associates states that Albert A. Calisti was solely responsible for preparation of all

[2b] The searches were requested by Mr. Calisti.

the exhibits other than the engineering exhibits.[3] Mr. Calisti testified that he was not actually solely responsible for the exhibits and that he put a "1" next to his name (denoting sole responsibility) because the only other choice was to place a "2" next to his name and this would indicate that the exhibits were prepared under his supervision. He was confused because he did not know what to indicate if two or three people had jointly prepared an exhibit (Tr. 234, 240).

10. To varying extents, all four of the partners participated in the preparation of the Albert A. Calisti and Associates application. Messrs. Wall and Seremet conducted interviews as part of the community needs survey and helped develop the applicant's programming proposal (Tr. 336–37, 444–45). Mr. Calisti was the guilding force in the partnership of Calisti and Associates and he performed more work on the application than any of the partners. Mr. Calisti initially called the FCC for information in late 1966. He thereafter hired Washington counsel and started filling out the application with Mrs. Calisti even before Wall and Seremet joined the group. In addition to conducting interviews of community leaders and aiding in development of the applicant's programming proposal, Mr. Calisti secured an antenna site (the Stewart property), and had Washington counsel prepare Sections I and II of the application, obtained the equipment credit letter and compiled the financial portions of the application with Mrs. Calisti (Tr. 179–81, 195–99, 204–07, 214).

Background of Mrs. Calisti

11. Prior to 1961 Mrs. Calisti had been employed in a glass factory and had worked as a waitress and a newspaper correspondent. In 1961 she became an employee of a real estate agency and has been in that field ever since. She has been general manager of a real estate office with the responsibility of training and supervising sales personnel, maintaining office records and submitting periodic reports. Since 1966 she has been an associate broker with the Matt Anderson Agency in Greensburg. Mrs. Calisti has had a broker's license (which requires a 3 years sales apprenticeship as well as college credits which Mrs. Calisti obtained by attending class over two winters) since 1964. Mrs. Calisti is a member of national, state and local Realtors organizations and has been an officer (Secretary-Treasurer and Secretary) of the Central Westmoreland Board of Realtors comprising nine communities since 1966 (C. W. Ex. 1, pp. 1–2; Tr. 148–149). She was the first female to become a member of the Central Westmoreland Board of Realtors. Mrs. Calisti has received four consecutive annual awards from the Board for outstanding performance in sales (Tr. 151).

12. Mrs. Calisti has been a broker with the Matt Anderson Agency since 1966. As a broker, Mrs. Calisti prepares her own sales agreements, leases and options. Mr. Anderson indicated that in his absence Mrs. Calisti is left in charge of the office. In August of 1970, Mrs. Calisti was in charge of the office for 2½ weeks. Mrs. Calisti intends to leave her position in real estate in the event that Central Westmoreland's application is granted (Tr. 147–48, 153, 159–60).

[3] The application listed Mr. Calisti as the general manager and chief engineer of the proposed station (C. W. Ex. 2, p. 4).

Mrs. Calisti's Participation in Preparation of Application

13. In connection with the preparation of the Albert A. Calisti and Associates application, Mrs. Calisti compiled the information needed for the legal qualifications section, compiled the figures needed for the financial qualifications section, helped locate a studio site and negotiated with its owner. Mrs. Calisti also discussed programming with the other partners and helped compile and review the results of the ascertainment of needs survey. She did not, however, conduct any of the surveys. Mrs. Calisti also assisted in the search for a transmitter site. She was familiar with the site ultimately selected—the Stewart property—but did not negotiate with the Stewarts on the theory that her being a broker might cause the cost of the property to rise. After her husband reached an oral agreement with the Stewarts, Mrs. Calisti had her attorney draw the lease (Tr. 491–504).[4]

Amendments to Calisti and Associates Application

14. On October 13, 1967, the Albert A. Calisti and Associates application was amended to include forms signed by 117 prospective advertisers of the proposed station indicating their willingness to purchase advertising in specified annual amounts (Tr. 509–10). These statements had been obtained between April 1, 1967 and August 31, 1967, by Mr. Calisti (57), Mr. Wall (52), and Mr. Seremet (7). Mrs. Calisti obtained none of them (Tr. 339–40).

15. On January 2, 1968, the Albert A. Calisti and Associates application was again amended. This amendment consisted of: (a) real estate appraisals of property listed in a joint financial statement of Mr. and Mrs. Calisti which was submitted as part of the application; (b) a breakdown of the operating expenses of the proposed station; and (c) an equipment credit letter from RCA addressed to Verna Calisti. The appraisals submitted with this amendment were obtained by Mrs. Calisti from another realtor. The equipment credit letter was obtained from RCA by Mrs. Calisti (Tr. 512–14).

Albert Calisti's Withdrawal

16. On January 5, 1968, the partnership doing business as Albert A. Calisti and Associates was dissolved by written agreement signed by Albert Calisti, Verna Calisti, John Seremet and L. Stanley Wall (C. W. Ex. 9). On that same day a new partnership was formed by Verna Calisti, Seremet and Wall. Mrs. Calisti was designated to have an 84.2% interest in the new partnership, Central Westmoreland Broadcasting Company (Central Westmoreland). Wall and Seremet retained the same percentage interest in the new partnership as they had had in its predecessor—7.9% each. The agreement provides that each partner would contribute capital in proportion to his ownership interest. It further provides that all decisions would be made by majority vote and that Mrs. Calisti would have three votes and Wall and Seremet one vote each. Mrs. Calisti had her attorney draw both

[4] Prior to the time that the lease was signed, Mrs. Calisti viewed the Stewart property and was introduced to Robert Stewart and his wife Sara. There is a third Stewart, Paul, who is Robert's brother (C. W. Ex. 13; Tr. 503–04, 659–63).

the dissolution agreement and the new partnership agreement. The name, Central Westmoreland Broadcasting Company, had been previously reserved at Mrs. Calisti's request but the reservation was not completed in time to be used when the Albert A. Calisti and Associates application was filed (Tr. 139, 533–34).

17. The stimulus behind Mr. Calisti's withdrawal on January 5, 1968, is found in his criminal record. Even prior to filing the Albert A. Calisti and Associates application each of the four partners were concerned that Calisti's record would present a problem. Before the application was filed, Mr. Calisti spoke to a staff member of the Broadcast Bureau about his record. He was encouraged by the staff member's response that other individuals with criminal records had been granted broadcast licenses. Although Mrs. Calisti, Mr. Wall and Mr. Seremet all had reservations about Mr. Calisti being a partner, they were mollified by his recounting of the conversation he had had with the Bureau staff member and the application was filed (Tr. 215–16, 344–46, 453–54, 518).

18. The record is not clear as to when consideration again turned to Calisti's record. Mr. Calisti thought that his partners decided to get him out of the partnership as soon as the application was filed (Tr. 218–21). Mr. Wall indicated that the single most important factor in his attitude concerning the necessity of dropping Calisti occurred when WHJB, Inc., licensee of Stations WHJB (AM) and WOKU (FM) in Greensburg, filed a Petition to Deny the Jeannette application with the Commission on August 25, 1967. WHJB's Petition to Deny was based, in part, on Mr. Calisti's convictions. On November 24, 1967, the city of Jeannette sent a letter to the Commission advising that it was withdrawing its support for the applicant and cited Mr. Calisti's record. The city had written an earlier letter on September 13, 1967, in support of the Jeannette proposal. The city's withdrawal of support prompted Wall to speak to Mrs. Calisti and Mr. Seremet about getting Mr. Calisti out of the partnership (Tr. 349–50, 399, 521–24, 624–26).

19. Mrs. Calisti recalls that she had discussions with Wall and Seremet shortly after the application was filed, in which they considered the possibilities of dismissing the application or putting pressure on Mr. Calisti to withdraw from the applicant (Tr. 517–19). There were further discussions following the city's letter withdrawing support for the proposal and they agreed to request that Mr. Calisti terminate his participation in the application [5] (Tr. 519–20). Calisti agreed with reluctance to withdraw (Tr. 524–25).

20. As noted previously, Mrs. Calisti succeeded to Mr. Calisti's 42.1% interest and became an 84.2% partner. Wall had discussions with Mrs. Calisti concerning the possibility of his acquiring a one-third interest in the reconstituted partnership but she told him that he would have to assume one-third of the applicant's expenses and he did not have the money. Wall also asked Mrs. Calisti if he could

[5] After the city of Jeannette withdrew its support for the proposal, Mrs. Calisti called the applicant's Washington counsel who informed her that, in his opinion, the application would not be granted with Mr. Calisti as a partner (Tr. 522–23). The letter from the city withdrawing support for Calisti and Associates was the catalyst which caused Mrs. Calisti to take some affirmative action with regard to Mr. Calisti's withdrawal from the partnership (Tr. 524).

increase his participation above 7.9% without paying the additional money immediately. Mrs. Calisti rejected the request (Tr. 355–58, 410–11).

21. Mr. Seremet recalls that at the time Mr. Calisti withdrew, Mrs. Calisti mentioned the possibility that more equity might be available. Seremet was not interested in increasing his participation because he could not afford it. Mrs. Calisti had not suggested a specific percentage as being available and there was no discussion of the cost of increased participation (Tr. 466–67, 480–82).

22. Mrs. Calisti discussed the availability of her husband's 42.1% interest with Wall and Seremet as a courtesy but she had no intention of offering them the opportunity to increase their participation. Although both the applicant's Washington counsel and her husband suggested that the three remaining partners each obtain one-third interests, Mrs. Calisti rejected this advice. She believed that with three equal partners, no partnership decisions would be made. She turned down Wall's request that he be permitted to increase his interest for the additional reason he did not have the money (Tr. 535–38, 753). Mrs. Calisti did not offer a larger interest to Seremet (Tr. 540).

23. As of January 5, 1968, Wall and Seremet had both contributed $5,000 to the applicant in return for their 7.9% interests (Tr. 369, 443). The Calistis did not make a specific contribution to the partnership but agreed to carry the expenses of prosecution, first-year operation and construction until these expenses totaled $55,000, which would constitute their contribution for the combined 84.2% interest (Tr. 761). As of January 5, 1968, the date on which Albert A. Calisti and Associates was dissolved and Central Westmoreland was formed, approximately $3,000 had been expended in prosecuting the application. No part of the $10,000 invested by Seremet and Wall was used to meet these expenses. Instead, a $3,000 gift which had been given to Mr. Calisti by his parents and deposited in the Calistis' joint checking account was utilized (Tr. 526–29, 765). Both Mrs. Calisti and her husband regarded half of the $3,000 as her personal money (Tr. 528). When Mr. Calisti withdrew from Albert A. Calisti and Associates he did not ask to be reimbursed for any monies he had contributed to the dissolved partnership (Tr. 531–32). Mrs. Calisti considered reimbursing her husband but decided against it because she felt that he was responsible for the problems facing the application (Tr. 527, 531). For his part, Calisti considered that he made a gift to his wife of the money he had contributed[6] although he did not know at the hearing how much of a contribution he had made (Tr. 272–73).

The Stewart Property

24. The Stewart property was proposed by Albert A. Calisti and Associates as its transmitter site. Detailed discussion concerning the disposition of that property is called for because Mr. Calisti had dealings with the Stewarts on behalf of the applicant just prior to and subsequent to his withdrawal as a partner. On February 8, 1967, an agreement was entered into between Albert A. Calisti and the

[6] Mr. Calisti testified (Tr. 273): "* * * I just walked away from it and allowed it as a gift to my wife. * * *"

Stewarts (Robert, Sara and Paul), which provided that the Stewarts would lease certain described property to Calisti at a monthly rental of $10 until January 31, 1968.[7] The agreement (C. W. Ex. 20) specifically provided that the property could be used for purposes of constructing a "radio tower." The lease contained two options. Albert Calisti was given the option to renew the lease on a yearly basis on the same terms as the original lease. He was also given the option to purchase the property upon written notice to the Stewarts. For the latter option, $50 was paid as consideration. By its terms (Par. 10), the agreement was assignable (C. W. Ex. 20). On March 28, 1967, Albert Calisti assigned the Stewart lease to the applicant, Albert A. Calisti and Associates (Tr. 661–62).

25. On December 26, 1967, Albert Calisti notified the Stewarts, by letter, that he intended to exercise the option to purchase contained within the lease.[8] On January 8, 1968, (three days following dissolution of Albert A. Calisti and Associates) an agreement was executed by Albert Calisti, as an individual, and the Stewarts providing that the lease was to be extended until July 31, 1968, at a monthly rental of $20 (Tr. 225, 230–32). Mrs. Calisti decided the Stewart property should be purchased when the lease extension agreement was drawn up (Tr. 677). There was no assignment of the lease from Albert A. Calisti and Associates to Central Westmoreland Broadcasting Company drawn up because of an oversight (Tr. 668).

26. At the time he signed the agreement which extended the lease, Albert Calisti gave the Stewarts a check covering several months rent. One more rental check was given to the Stewarts [9] before the property was purchased by Verna Calisti in her name on June 27, 1968 (C. W. Ex. 13; Tr. 675–77). The purchase was arranged by Howard M. Whitehead, Mrs. Calisti's attorney, and the closing took place in his office. The $3,000 purchase price was paid by Mrs. Calisti (using her own money). Albert Calisti was not present at the closing (Tr. 138, 667–71, 747).

27. The Stewart property was subsequently abandoned as the proposed transmitter site. Mrs. Calisti searched for and located a new site in an area prescribed by the applicant's engineer after she was informed by Washington counsel that the Stewart site caused critical hour problems and that a waiver would be necessary. He suggested that a new site be located. Mrs. Calisti first became acutely aware of the engineering drawback of the Stewart location after the Stewart property had been purchased (Tr. 589–91, 844–45). Previously, in July, 1969, Mr. Calisti had mentioned to her that a grant to Central Westmoreland was in jeopardy because of an engineering deficiency (Tr. 843–44).

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[7] In a pre-designation pleading Central Westmoreland alleged that Mrs. Calisti was "solely responsible" for arranging the real estate rights involved in the proposal. Mrs. Calisti admits that this was not accurate. Her affidavit annexed to that pleading indicated that "All legal documents such as partnership agreements, leases, searching for transmitter site and dealing with our local attorney were handled by me." Mrs. Calisti and her counsel were considering correcting the pleading, which was filed on March 15, 1968, when WHJB, Inc., filed its reply on April 3, and pointed out the inaccuracy (C. W. Ex. 2, pp. 11–12; Tr. 620–27). They were relying on her affidavit if the need for clarification of the inconsistency arose (Tr. 628).

[8] Official Notice taken of letter to Stewarts, attached to April 3, 1968 Reply of WHJB, Inc. in Docket No. 19042.

[9] Mrs. Calisti did not remember who signed the last rental payment check (Tr. 676–77).

28. Why did Albert Calisti deal with the Stewarts shortly before the January 5, 1968 dissolution agreement and again several days after dissolution? Mr. Calisti explains that the Stewarts were elderly and difficult to deal with. Both Mr. and Mrs. Calisti believed that it would be best for Mr. Calisti to continue dealing with them since there was another buyer interested in the transmitter site (C. W. Ex. 2, p. 6; Tr. 226–28). They also believed that the applicant might have been in danger of losing the site if someone other than Mr. Calisti dealt with the Stewarts (C. W. Ex. 2, p. 6; Tr. 226–28, 665).[10] The Stewarts had called him several times and told him that there was another prospective buyer for the property. The Stewarts indicated that they did not wish to extend the lease (Tr. 228). Mr. Calisti visited the Stewarts and was told that the other potential buyer had offered two to three times the amount Calisti had agreed to pay for the property. The other buyer was identified as Melvin Goldberg. Robert Stewart told Calisti that Goldberg had bought property from them before and had given them gifts. Mr. Stewart pointed to a color television set and described Mr. Goldberg as "nice to him" which Mr. Calisti interpreted to mean that Goldberg had given the Stewarts a color television set (Tr. 277–78, 282).

29. Melvin Goldberg is President, General Manager and a 29% owner of WHJB, Inc., the intervenor in this proceeding. WHJB, Inc. is the licensee of Station WHJB (AM) and WOKU–FM in Greensburg, Pennsylvania. Mr. Goldberg testified and confirmed that he had expressed interest in the Stewart property. Goldberg has had dealings with the Stewarts and has purchased parcels of property from them on which WHJB, Inc. constructed a head end for a CATV system. In early 1967, when Robert Stewart mentioned that Albert Calisti had taken an option to purchase part of his property for $3,000 to be used as an antenna tower, Goldberg became concerned. He had previously had occasion to be advised by his engineer that a radio tower could cause problems to a CATV head end if the two were situated close together. WHJB, Inc.'s head end, which was completed in January 1967, is situated less than one mile from the Stewart property. Goldberg spoke to his engineer and, two days after learning of Calisti's option, offered the Stewarts $4,000 for the property. Goldberg knew that Calisti had an option but felt that it would be worthwhile to purchase the property if Calisti did not act on the option, so that it would not be available to someone else who might be interested in erecting a tower which would interfere with the WHJB, Inc. head end. The $4,000 offer was never renewed by Goldberg. Robert Stewart had only mentioned that Calisti had an option to purchase. Goldberg did not learn until March 1968, that the agreement also contained a lease and an option to extend the lease. Goldberg denies that he ever attempted to get the Stewarts to refuse to extend the lease (Tr. 885–88, 891–93, 921, 932–33, 939, 969–70).

30. Mr. Goldberg also verified that he had given gifts to the Stewarts on two occasions. The gifts were given at Christmas time in 1967, and 1968. Both gifts were inexpensive radios with the second Christ-

[10] Mrs. Calisti purposely avoided removing by assignment or otherwise Mr. Calisti's name from the option agreement in order to avoid disturbing the terms of the agreement (C. W. Ex. 2, p. 6).

mas gift occurring after Albert Calisti acted for Central Westmoreland by extending the Stewart lease. Mr. Goldberg did not present the Stewarts with a color television. Robert Stewart did, however, ask Goldberg where he could purchase a color set and Goldberg told Stewart that he should mention his name in order to get a discount (Tr. 899, 945–46, 950, 955). A sales receipt from the local dealer, Stanley's TV and Appliance Center, shows that there was a sale of a color television set to the Stewarts with equal payments of $257.05 made on March 12, 1968, and April 15, 1968 (Tr. 911–12).

31. In certain aspects of their testimony concerning the Stewart matter, Mr. and Mrs. Calisti contradict each other. Verna Calisti indicated that it was her decision to purchase the Stewart property and that Albert's December 26, 1967 letter to the Stewarts notifying them that the option to purchase was being exercised was her decision (Tr. 678–79). She also testified that Albert obtained the January 8, 1968 lease extension at her request and that she was with him when the extension agreement, which she had prepared by lawyer Whitehead, was signed. The extension agreement was signed by all three Stewarts and Albert Calisti. Verna Calisti notarized the four signatures. She asked her husband to extend the lease because she did not want to risk loss of the site[11] (C. W. Ex. 21; Tr. 665, 678–79).

32. Albert Calisti testified that he obtained the extension of the Stewart lease in his own name without his wife's blessings; that she wanted to get the extension in her own name or in the partnership name; and that he went ahead and obtained the extension because he was friendly with the Stewarts and did not want his wife to lose the property to Mr. Goldberg. Finally, Mr. Calisti indicated that when he showed his wife that he had obtained the extension they had an argument (Tr. 226–28).

33. The fact that Mrs. Calisti notarized the lease extension indicates that she was aware that the document was being executed and tends to corroborate her account of the incident, namely, that Albert A. Calisti secured the extension of the lease at her request. Accordingly, the Examiner is relying upon her testimony as a more accurate recollection of the extension incident.

Albert Calisti As A Proposed Employee of Central Westmoreland

34. The dissolution of Albert A. Calisti and Associates and the formation of Central Westmoreland was reported to the Commission by an amendment filed on January 19, 1968. Although Albert Calisti was no longer a partner, this amendment indicated that he was retained as the applicant's proposed chief engineer. Mrs. Calisti became the proposed general manager. While the amendment refers to Albert Calisti as a proposed "employee" of the station, as does Mrs. Calisti's written testimony, she now believes that the word may have been misused. It was only intended that Mr. Calisti would be a contract engineer. Mr. Calisti was considering being the contract engineer for several local stations including the Jeannette station. He was, at that

[11] With regard to the subsequent purchase of the property, Mrs. Calisti had her attorney handle the arrangement. She did not personally become involved prior to closing because she was fearful of the "pressure" on the Stewarts to sell the property to another buyer (Tr. 846–47).

time, the contract engineer for WTRA, Latrobe, Pennsylvania. Central Westmoreland was to pay Mr. Calisti for his services and the amount of $40 to $50 per week was discussed. This amount would have been comparable to his compensation at WTRA (C. W. Ex. 2, p. 6; Tr. 754–56, 834–39). Mr. Seremet indicated in his testimony that Mr. Calisti was to be retained as a "consultant engineer" on a salaried basis with the idea of avoiding the cost of a full-time engineer (Tr. 476–79).

35. On August 7, 1968, an amendment was filed by which Albert Calisti was eliminated as a proposed employee of the applicant. The amendment stated he would not be associated with the proposed facility in any way. Mrs. Calisti had become convinced that her husband should have no connection with the applicant. This view developed from statements made by potential advertisers as well as an incident that occurred at a City Council meeting during the spring of 1968. At that meeting the Council was asked to support, once again, the Jeannette application. The mayor expressed interest in whether Albert Calisti would be an employee of the station. Mr. Calisti acknowledged that he would be an employee but apparently understood that the mayor would have preferred otherwise. Mrs. Calisti reports that the Council later agreed to support the application of Central Westmoreland (C. W. Ex. 2, p. 9; Tr. 586–87, 752). Mr. Seremet had also expressed his opinion that Mr. Calisti should not be retained as an employee and takes some credit for having convinced his partners to eliminate that aspect of the proposal (Tr. 476–78). Mr. Wall made it unanimous. Wall had been unhappy about retaining Albert Calisti as an employee in the first place and when he later heard that Mr. Calisti's then employment at another radio station was being questioned, he decided that the proposal to employ his former partner would have to be eliminated (Tr. 407–08).

Prosecution of the C. W. Application

36. On June 28, 1968, the applicant partnership once again experienced a reorganization. This time L. Stanley Wall left the partnership and his 7.9% interest was taken by Verna Calisti who became a 92.1% partner. Mr. Wall's withdrawal was dictated by financial problems he was experiencing. After paying his $5,000 obligation to the partnership in full, Mr. Wall found it necessary to borrow against his investment. He sought and obtained loans from Mrs. Calisti until he had borrowed $2,650 [12] of the $5,000 he had invested. In June of 1968, he again sought a loan from Mrs. Calisti who told him that debts were being incurred by the applicant and that she could not allow him to borrow additional funds. She asked him to return the amount he had already borrowed. When Wall indicated that he was unable to return the money, Mrs. Calisti suggested that he withdraw from the partnership. Wall agreed to do so and the dissolution agreement was signed on June 28, 1968, and filed with the Commission on August 7, 1968. Mrs. Calisti returned the balance of the $5,000 plus interest to Wall (Tr. 380, 412, 578–79). She did not offer any of Wall's percentage interest to Seremet when Wall withdrew (Tr. 753).

[12] The money was advanced to Wall by Mrs. Calisti out of her own funds which she earned as a broker (Tr. 578, 780–81).

37. Wall's departure and the formation of a new partnership by Mrs. Calisti and Mr. Seremet was reflected in an amendment filed with the Commission on August 7, 1968. That amendment, which was prepared by Mrs. Calisti, also contained a new first year operating budget. Mrs. Calisti verified the various expense items appearing in the budget. She personally ascertained the cost of UPI service and insurance and secured an equipment credit letter from RCA (C. W. Ex. 2, p. 7, Exs. 4, 14 and 15; Tr. 570–75, 580–84).[13] The amendment included 113 statements of intent from local advertisers. In collecting these statements, Mrs. Calisti recontacted 100 potential advertisers who had given statements to Albert A. Calisti and Associates in 1967, as well as 13 additional merchants who had not given statements previously (Tr. 583–84). By decision of Mrs. Calisti, a change in the law firm representing Central Westmoreland was made.

38. The August 7, 1968 amendment included a letter dated July 25, 1968, from the Commercial Bank & Trust Co., Greensburg office, addressed to Central Westmoreland. The letter extends a $50,000 line of credit to the applicant with repayment to begin 14 months after the loan is made and to extend over five years. The letter recites the security for the loan (C. W. Ex. 6):

(a) 232 Tremont Avenue, Greensburg
(b) 519 Grove Street, Greensburg
(c) 492 Hamil Road, Township of Pennsylvania
(d) 294 Wylie Avenue, Strabane
(e) A six room dwelling at Hills Church, Franklyn
(f) $10,000 on deposit in a non-interest bearing certificate
(g) A stand-by fee of one-half of one percent per annum.

39. Mrs. Calisti had initially approached the Commercial Bank in May, 1968, and had successfully negotiated a $50,000 line of credit which was expressed in a bank letter dated May 31, 1968. The security for the May 31 letter was the same as stated in the July 25 letter. Counsel was not satisfied with the wording of the May letter and asked Mrs. Calisti to obtain a new letter. The July 25 letter was the result of that effort (C. W. Ex. 12; Tr. 552–54). As of May 31, 1968, four of the five properties listed as security for the loan were owned jointly by Mr. and Mrs. Calisti. The fifth property, located at Hills Church, Township of Franklin, was owned by Mrs. Calisti's parents, Mr. and Mrs. Moose (Tr. 83–84, 559). On May 31 a judgment note in the amount of $50,000 was signed by Albert Calisti, Verna Calisti, Theodore Moose and Dorothy Moose. The signatures of Mrs. Calisti and Mr. and Mrs. Moose were required because they owned property which was to secure the bank loan (Tr. 839–40). Mrs. Calisti pointed out that Albert Calisti, in testifying that the only services he has performed for Central Westmoreland was obtaining an extension of the Stewart lease, neglected to mention that he had signed the May 31, 1968 judgment note which enabled Central Westmoreland to obtain the bank loan. As far as Mrs. Calisti is concerned, her husband performed no other services for Central Westmoreland (Tr. 561–63).[14]

[13] The Examiner took official notice of the August 7, 1968 amendment at Tr. 579–80.
[14] A judgment note is a confession of judgment and is recorded in court (Tr. 81–82, 563).

40. As mentioned above, four properties owned jointly by Mr. and Mrs. Calisti were to secure the loan specified in the May 31, letter. On July 22, 1968, these properties were transferred to Mrs. Calisti, as the sole owner, for no consideration (Tr. 255, 607–08, 740–41). Mr. Calisti testified that he had discussed turning the properties over to Mrs. Calisti prior to the filing of the Jeannette application because of his criminal record. Also, Mr. Calisti thought she could handle the properties better than he could (Tr. 258–59, 269). He stated that he does not recall who suggested that he transfer his joint interest to Mrs. Calisti in 1968 (Tr. 256). He also stated that Mrs. Calisti asked him to deed the property to her so that she could use it as collateral for the bank loan (Tr. 258). Finally, Mr. Calisti took the middle road. He testified that Mrs. Calisti asked him for property, but he was going to give the property to her anyway because of the problems he had caused. He wanted to help her get the station. Sometimes he still feels he could have kept his interest in the property. His decision on whether or not to transfer his interest could have gone either way (Tr. 269–70). Mr. Calisti considers the transfer to have been a gift to his wife for the purpose of aiding the application (Tr. 258).

41. Mrs. Calisti testified that she never asked her husband to transfer the property to her although they did discuss the matter. In 1965 Mr. Calisti had volunteered to transfer the property to Mrs. Calisti but she declined because she felt it would have been taking advantage of the circumstances. After she obtained the bank loan in May 1968, Mr. Calisti again volunteered to transfer the property to her and asked her to have her attorney draw up the deeds. This time she accepted the offer. She wanted to be financially independent of her husband and needed the property to do so. Since Mr. Calisti had to sign the judgment note for the loan, she knew she was not yet independent of him. She believes that he was repaying her for having remained loyal to him during his troubles (Tr. 600–604).

42. The estimated market value of the four properties transferred to Mrs. Calisti was $55,450 as of March 1967. On July 22, 1968, the four properties had mortgage balances of $21,728. If it is assumed that the market value of properties remained the same between March 1967 and July 1968, the net value of the properties transferred approximated $33,860 (C. W. Ex. 17).

43. On July 22, 1969, a hand written agreement was signed by Verna and Albert Calisti. The agreement provided that the application would be amended to include Albert Calisti and that the properties that were formerly jointly owned would be transferred back to Albert and Verna Calisti on a "50–50 basis" (C. W. Ex. 3). Mrs. Calisti explained the circumstances under which she signed this agreement. At the time, she was having a dispute with her husband and had left him for several weeks. The possibility of a divorce was under discussion. She was also under pressure from her children (who were then aged 20, 19, 17 and 15), who felt that she had taken advantage of their father. On the same day that she signed the agreement, Mrs. Calisti asked her husband to return it to her, telling him that she could not agree to its terms without Mr. Seremet's concurrence. Mr. Calisti told her he had taken it to his office at WCVI, Connelsville. The next day she told him that she would follow him to the station to get the

agreement. She went to WCVI on July 23. Mr. Calisti did not appear. While at WCVI, Mrs. Calisti received a telephone call from Whitehead, her attorney, who told her that Mr. Calisti was in his office. Whitehead advised Mrs. Calisti not to cause problems for her husband at WCVI. Then Mr. Calisti spoke to his wife. She told him that she wanted the agreement back—that she could not agree to its contents. Mr. Calisti told her to go to their home and he would return the agreement. When she arrived home, Mr. Calisti surrendered the agreement (Tr. 637, 639–650).

44. Mrs. Calisti continued to prosecute the Central Westmoreland application after July 22, 1969.[15] Her intent is that Mr. Calisti will never have any relationship with the station, either in an ownership capacity or as an employee (Tr. 647–48).

45. On November 3, 1970, the Commercial Bank & Trust Co., issued a letter renewing the line of credit to Central Westmoreland. In its letter, the bank agreed to a request made by Mrs. Calisti to exclude the Wylie Avenue, Tremont Avenue and Grove Street properties as collateral for the loan. The collateral specified in the November 3 letter included properties at 492 Hamil Road, 218 Ridgefield Drive, Greensburg, and 12 acres on Mt. Thor Road, Greensburg. Additional security was specified as a $10,000 non-interest bearing certificate, a $10,000 interest bearing certificate and assignment of $32,000 life insurance policy of Verna Calisti (C. W. Ex. 7).

46. The Hamil Road property was one of the jointly owned parcels which was transferred to Mrs. Calisti on July 22, 1968.[16] This property was purchased in 1964; the downpayment came from Mrs. Calisti's personal funds. The Ridgefield Drive property was purchased in 1970 by Mrs. Calisti with her own funds. There is a mortgage on the Ridgefield property in her name. The monthly mortgage and tax payments are less than the income derived from the property (C. W. Ex. 17, Ex. 18; Tr. 596–99, 748). The 12 acres on Mt. Thor Road is the aforementioned Stewart property which Mrs. Calisti purchased in her own name in 1968, with her own funds. There is no mortgage on the Stewart property (Tr. 599, 747).

47. The November 3, 1970, bank letter was issued in response to a request made by Mrs. Calisti in October that the line of credit be issued on the basis of her individual financial responsibility (Tr. 75–76). There had been an extension of the loan in June, 1969 based on the original security (Tr. 79–80). In issuing the November 3 letter the bank relied on the personal guarantee and real estate holdings of Mrs. Calisti (Tr. 80). The bank required a new judgment note. This time it was signed by Mrs. Calisti only, and was recorded against her properties (C. W. Ex. 19; Tr. 81–82). In taking real property as collateral, the bank is concerned with who is the title holder and not who is liable on the mortgage (Tr. 113–14). A satisfaction of the May 31, 1968 judgment note, dated December 22, 1970, was filed on December 29 (Tr. 566–67).

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[15] After the designation Order was released on October 13, 1970, Mr. Calisti attempted to persuade Mrs. Calisti to dismiss the application. He was concerned that his career in broadcasting would be jeopardized by a hearing on the designated issues. Mrs. Calisti flatly refused to dismiss the application (C. W. Ex. 2, pp. 12–13; Tr. 651).

[16] There is a mortgage on the Hamil Road property in the names of Mr. and Mrs. Calisti. Mrs. Calisti makes the payments (Tr. 743–44).

48. Although Mrs. Calisti realizes that the $50,000 line of credit is being issued to the applicant partnership, she intends to treat it and interest on the loan as her personal obligation rather than a partnership debt. Mrs. Calisti plans to repay the loan from her personal funds and hopes to be able to do so out of her share of the station's revenues (Tr. 795–96, 810–11).

49. The Calisti's have four children of whom two are employed. The other two children are students (C. W. Ex. 2, p. 1). Mrs. Calisti has worked full-time since July, 1961 (C. W. Ex. 2, p. 2, Tr. 508). Insofar as Mr. Calisti's income has been adequate, he takes care of the ordinary household expenses. He estimates he was successful in supporting the family totally about 90% of the time. Mrs. Calisti's income is relied upon to supplement Mr. Calisti's in covering expenses when his earnings are not sufficient to do so. Insofar as Mrs. Calisti's earnings are not needed for family expenses, she segregates them for her own personal use (Tr. 244–45, 736–37).

50. From the very beginning, Mrs. Calisti's financial support was a necessity. Albert Calisti's income was not sufficient to support a family and fund the application. Even prior to the successful channel search, she has agreed with her husband that most of her income would be contributed to the venture. Without her income, an application would not have been possible (Tr. 526–27, 630–31).[17]

51. Mrs. Calisti proposes to meet most of her financial obligation to the applicant in return for her 92.1% interest by supplying it with the $50,000 from the line of credit, plus additional funds of her own. Her total obligation is $60,000 (Tr. 770). Mrs. Calisti's gross income as a broker for the years 1970, 1969 and 1968 was $12,646, $9,345 and $7,899, respectively (Tr. 824). She also had some rental income (Tr. 825). Central Westmoreland maintains a bank account which now has in excess of $15,000 on deposit. The applicant also has $10,000 in savings certificates. These funds were provided by Mr. Seremet's $5,000 with the balance being supplied by Mrs. Calisti (Tr. 820–22).[18]

52. The proposed transmitter site of Central Westmoreland is known as the "Doberneck property". In order to view this site, Mrs. Calisti hired the services of Terry James DeGlau, a professional photographer who testified that Mrs. Calisti had contacted him in the fall of 1969 (Tr. 47, 590). Mr. DeGlau made arrangements for a plane so that he could take the pictures needed for identification of the property. His sole contact with Central Westmoreland was with Mrs. Calisti (Tr. 50). Even though Mrs. Calisti was subject to severe air sickness and fearful of flying (Tr. 49), she nevertheless insisted on flying with Mr. DeGlau to view the property since she felt that it was extremely important to have an eye-witness view of the area. It was Mrs. Calisti who secured the six-month extension of the option on the Doberneck property (Tr. 595). She will either assign the option to Central Westmoreland or lease it to the applicant for a nominal sum (Tr. 591). She made the payment to the bank in August, 1969, for extending the

[17] Mr. Calisti had tried unsuccessfully to obtain a bank loan for Albert A. Calisti and Associates. He had approached approximately 20 banks. Mrs. Calisti's success in getting a $50,000 line of credit surprised him (Tr. 264).

[18] The $10,000 in a savings certificate is security for the $50,000 line of credit. In addition, Mr. Seremet has hypothecated other certificates of his own to secure the loan (Tr. 119, 820–22).

line of credit previously issued to Central Westmoreland (Tr. 591). Mrs. Calisti has contributed over $2,000 of her personal funds to the Central Westmoreland application, most of this money involving attorneys' fees (Tr. 778).

53. A number of witnesses testified as to Mrs. Calisti's reputation for truthfulness in the community. Her reputation for truthfulness was vouched for by Mr. Thomas H. Brown, the insurance agent and realtor, who, having known Mrs. Calisti for ten years, stated that her reputation was of the highest caliber (Tr. 71). It was also attested to by Howard M. Whitehead, her attorney, who has also known Mrs. Calisti for about ten years (Tr. 135) and testified that her reputation in the community for truthfulness was very good (Tr. 136). Lastly, her coworker, Mathew H. Anderson, who has worked with her since 1965 (Tr. 148), testified that Mrs. Calisti's reputation for truthfulness in the community was excellent (Tr. 156).

Albert Calisti as a Party

54. Certified copies of Albert Calisti's convictions as well as the information and complaints are in the record as Calisti Exhibits 1–4.[19] These documents are therefore available to the reviewing authorities. In view of the Conclusions on Issue 2 set forth *infra*, and because of the sensitive nature of this matter, it is not deemed necessary to detail Mr. Calisti's record in these Findings.

Cross Interests

55. At the time this proceeding was designated for hearing, Mr. Calisti was employed by Station WTRA, Latrobe, as general manager and chief engineer. Mr. Calisti's employment at WTRA is now limited to contract engineer and part-time salesman. (As a contract engineer, he performs only technical duties (Tr. 280).) Mr. Calisti sells time for WTRA primarily in Latrobe, but also in Ligonier, Mt. Pleasant, Blairsville and Greensburg (C. W. Exs. 24 and 26). Over half of the area within the 0.5 mv/m contour of the proposed Jeannette station is also within WTRA's 0.5 mv/m contour. All of the communities in which Mr. Calisti sells time for WTRA are located within the overlapped area. Approximately one-third of the area within the proposed station's 2 mv/m contour is also within WTRA's 2 mv/m contour. This common area encompasses Greensburg and part of Latrobe. (C. W. Ex. 25).

56. Mr. Seremet is also employed at WTRA where he is an announcer. He will leave WTRA and work full-time at the Jeannette station if Central Westmoreland's application is granted (C. W. Ex. 1).

CONCLUSIONS

Relationship of Albert A. Calisti to Central Westmoreland

1. The first issue in this proceeding requires a determination as to whether, in light of all the evidence adduced with respect to the prepa-

[19] Mr. Calisti was represented by counsel (not Central Westmoreland's) in this proceeding.

ration and filing of the application of Central Westmoreland Broadcasting Company, Albert A. Calisti must be deemed to have an interest in this application. The background and history of the Central Westmoreland application, as reflected by the findings of fact, are reviewed below in order to resolve the issue.

2. On March 30, 1967, an application to construct a new standard broadcast station in Jeannette, Pennsylvania, was filed by a partnership d/b as Albert A. Calisti and Associates. There were four partners to the application. Albert Calisti and his wife, Verna, both had 42.1% interests. The Calistis reside in Greensburg, Pennsylvania, about six miles from Jeannette. Two other partners, L. Stanley Wall and John Seremet, both had 7.9% interests. After the application was filed, but prior to designation of the proceeding, the Albert A. Calisti and Associates application encountered opposition based upon Mr. Calisti's criminal record. By amendments to the application which continued to be prosecuted by a partnership d/b as Central Westmoreland Broadcasting Company, Albert A. Calisti was ostensibly removed from the partnership and then eliminated as a proposed employee. In this proceeding, it must be determined whether Albert Calisti's withdrawal was as complete as the amendments purported or whether he actually maintains an interest, be it direct or indirect, in the present applicant.

3. In looking at the natal days of what is now the Central Westmoreland application, one finds it was Mr. Calisti who carried the laboring oar. He had two frequency searches conducted after discussion with Mrs. Calisti and then obtained two partners who were willing to contribute $5,000 each to the venture in return for their 7.9% interests. He also retained communications counsel and an engineer, and arranged for the partnership articles to be drawn up. The antenna site was secured by him. He obtained the equipment credit letter. Mr. Calisti conducted interviews with community leaders, obtained statements of intent from prospective advertisers, and participated in formulating the programming.

4. Mrs. Calisti was involved from the beginning. She agreed with her husband that they should invest in the expense of searching for a frequency. She also agreed to contribute the major portion of her income as a real estate broker to the application. Without her agreement to aid the venture financially, the application would not have been filed. Mrs. Calisti assisted in the search for a transmitter site and had her attorney draw the lease. She found a studio site and negotiated with its owner. With regard to preparation of the Calisti and Associates application, Mrs. Calisti compiled the information for the legal qualifications section, and compiled the figures for the financial qualifications section, participated in review of the results of the ascertainment of needs survey and discussed programming with the other partners. The other two partners also participated in the preparation of the application by conducting interviews in connection with the community needs survey, by obtaining statements of intent from advertisers, and by assisting in developing the programming.

5. On August 25, 1967, WHJB, Inc., licensee of WHJB and WOKU (FM) Greensburg, filed a Petition to Deny the Albert A. Calisti and Associates application. One of the reasons urged by WHJB for rejecting the Jeannette proposal was the character qualifications of Albert

Calisti, a 42.1% partner. In November 1967, the city of Jeannette informed the Commission that because of Mr. Calisti's criminal record it was withdrawing its support for the application submitted in a September 1967 letter. These two reversals and especially the latter, caused Mrs. Calisti, Mr. Wall and Mr. Seremet to conclude that Albert Calisti should not be a partner. Mr. Calisti reluctantly agreed to withdraw from the application when requested to do so. The remaining three partners had misgivings about Mr. Calisti's participation in the application almost from the moment the application was filed. After the city of Jeannette withdrew its support, the applicant's Washington counsel had informed Mrs. Calisti that, in his opinion, the application could not be granted with Mr. Calisti as a partner.

6. On January 5, 1968, the partnership of Albert A. Calisti and Associates was formally dissolved and a new partnership, Central Westmoreland Broadcasting Company, was formed. In the new partnership, Messrs. Wall and Seremet maintained their 7.9% interests. Mrs. Calisti succeeded to her husband's entire 42.1% interest and became an 84.2% partner. Mrs. Calisti did not offer her partners the opportunity of increasing their interests, although Wall would have liked to have done so if no immediate additional contribution was required. She rejected the suggestion of an equal division of ownership in Central Westmoreland since she believed that such an arrangement would frustrate the decision-making process of the partnership.

7. Albert Calisti's severance from the application was not complete. He was retained as the applicant's chief engineer. The partners hoped to save money by having Mr. Calisti perform engineering services on a contractual basis for $40 or $50 per week. As time went on, the partners in Central Westmoreland became convinced that Mr. Calisti's connection with the application even as contract engineer was not desirable. This view was crystallized after adverse statements from prospective advertisers and an apparent indication of disapproval of Mr. Calisti's employment with the applicant by a local public official. By an amendment to the Central Westmoreland application filed on August 7, 1968, Albert Calisti was eliminated even as a proposed employee of the applicant; the amendment asserted he would not be associated with the proposed station in any way.

8. L. Stanley Wall withdrew from the partnership on June 28, 1968, because of personal financial reasons. Mrs. Calisti did not offer any of Wall's percentage interest to the other partner, Mr. Seremet, and increased her own interest in the Central Westmoreland partnership to 92.1% by virtue of Wall's withdrawal. His departure and the formation of a new partnership consisting of Mrs. Calisti and Mr. Seremet were recorded with the Commission in an amendment filed on August 7, 1968.

9. When Albert Calisti withdrew as a partner, approximately $3,000 had been expended on the Jeannette application. The expenses were paid from a $3,000 gift to Mr. Calisti from his parents which sum had been deposited in a joint checking account of the Calistis. They regarded half of the $3,000 as the personal money of Mrs. Calisti. When Mr. Calisti left the partnership, he did not ask for reimbursement of any part of the money spent in the prosecution of the application nor

has he been reimbursed to any extent by the applicant. He looks upon the money he contributed toward the application as a gift to his wife. In his words, "I just walked away from it (the application) and allowed it as a gift to my wife."

10. After his withdrawal, Albert Calisti aided the application in several ways. On January 8, 1968, just three days after dissolution of Albert A. Calisti and Associates, he executed as an individual an extension of the lease on the Stewart property—the then proposed transmitter site. He did it at Mrs. Calisti's request.[20] Both Mr. and Mrs. Calisti believed that there was a threat to the continued availability of the proposed transmitter site. The Stewarts, who owned the property, had informed Albert Calisti that another buyer, Melvin Goldberg, had offered more money for the site than had Calisti (who had signed the original lease). Mrs. Calisti, having already decided to purchase the Stewart property, asked her husband to get the extension so as to protect the property.[21]

11. The original lease on the Stewart property had been assigned by Albert Calisti to the partnership. The terms of the lease gave Albert Calisti, and his assigns, the *right* to extend the lease. As a matter of law, the Stewarts were prohibited from selling the property out from under Calisti (or his assigns). However, Goldberg had made an offer to purchase the Stewart property and had given a gift to the Stewarts (although not a color television as Calisti believed). It must be concluded that Mrs. Calisti genuinely feared for the continued availability of the site and relied upon her husband since he had previously dealt with the Stewarts who are elderly and difficult to do business with. Mr. Calisti, who does not conceal his desire to see his wife obtain the Jeannette station, agreed that he should continue dealing with the Stewarts. That Mrs. Calisti was not willing to have Central Westmoreland rely upon its *legal* rights under the Stewart lease is seen in the monthly rental that Mr. Calisti agreed to pay under the extended lease. The orginial lease provided for monthly rental of $10. The agreement provided that lease was renewable under the same terms as the original lease. Therefore, Albert Calisti could have insisted that the extended lease specify the same rental. However, the extended lease specified a monthly rental of $20. It thus appears that Mrs. Calisti, who deals with leases and options as a real estate broker, was not prepared to rely upon the applicant's legal rights under the lease at the risk of alienating the Stewarts and having them sell the property to someone else. It was, therefore, not unreasonable for her to utilize her husband's good offices with the Stewarts. His services in the matter on behalf of an applicant, whose majority owner was his wife, do not lead to the conclusion that Albert Calisti retained an interest in the application beyond January 5, 1968.

12. In connection with the extension of the lease, Mr. Calisti gave the Stewarts a check for three months rent which would amount to $60.00 (Tr. 676). Although the check was signed by him, the record

[20] Mr. Calisti's testimony that he obtained the lease extension without Mrs. Calisti's knowledge or consent must be rejected. Mrs. Calisti notarized the signatures on the extension (C. W. Ex. 21).

[21] On December 26, 1967, Albert Calisti had sent the Stewarts written notice of his intention to exercise an option to purchase the property. The option to purchase was included within the lease agreement.

does not indicate that this payment was made from Mr. Calisti's personal checking account. Nor does the record show the source of a subsequent rental payment for one month (Tr. 676). Because of Mr. Calisti's evident willingness to assist his wife in obtaining a station, it cannot be inferred from the payment of $60.00 that he had an interest in the application, if in fact this small sum came from his personal funds.

13. Several months after the dissolution of Albert A. Calisti and Associates, Mr. Calisti signed a judgment note that was required by the bank which had issued Central Westmoreland a $50,000 letter of credit. So did Mrs. Calisti's parents who were not partners to the application and never had been. Their signatures were necessary because they owned property which was used to secure the loan. In Albert Calisti's case, property he owned jointly with his wife was so used. His signing the judgment note was certainly an important act in support of the application. It does not, however, demonstrate that Albert Calisti had a hidden interest in Central Westmoreland or that he retained control of the applicant. What is shown is that he, like Mrs. Calisti's parents, was helping Mrs. Calisti.

14. Albert Calisti's final act which can be considered helpful to the Central Westmoreland application occurred on July 22, 1968. He conveyed his interests in properties owned jointly by the Calistis to his wife. The net value of the properties transferred (i.e., after deducting mortgage balances) was about $33,860. Mr. Calisti received no payment for his interests. Mr. Calisti, who had volunteered to transfer the properties to his wife even before the application for a Jeannette station was filed, wanted to help her obtain the radio station and regards the transfer as a gift to his wife. Mrs. Calisti who had previously rejected her husband's offer to transfer the properties now wished to be financially independent of him. It is not clear whether Mr. Calisti again volunteered the transfer or Mrs. Calisti requested that he do so. But the transfer gave Mrs. Calisti the financial independence she wanted. In November 1970, Mrs. Calisti obtained a renewal of the $50,000 line of credit. She alone signed a new judgment note which replaced the earlier note signed by Mr. Calisti, as well as his wife and her parents. The property securing the current line of credit is owned by Mrs. Calisti and includes only one of the properties previously owned by Mr. and Mrs. Calisti jointly.

15. There is no evidence that Albert Calisti's July 22, 1968 transfer of his interest in jointly held properties was anything but an outright gift to Mrs. Calisti. In fact, a subsequent attempt by Mr. Calisti to pressure Mrs. Calisti to transfer the properties back into their joint names tends to indicate that there is no secret agreement by which he retained an interest in these properties. Mrs. Calisti, having been subjected to family pressure, temporarily agreed to transfer the properties back to their joint names and to amend the application to include Albert Calisti's name. The agreement lasted one day. Mrs. Calisti survived a severe test of her determination to prosecute the Central Westmoreland application without her husband. Furthermore, Albert Calisti's insistence at the time on having his name appear as a principal of the applicant points to the conclusion that there is no undis-

closed agreement whereby Albert Calisti retains an interest in Central Westmoreland.

16. Following Albert Calisti's withdrawal, Mrs. Calisti has vigorously prosecuted the application. She secured a $50,000 line of credit,[22] made the payment to the bank for extending the line of credit, obtained renewed and new statements of intent to advertise from local merchants, purchased the Stewart property in her own name with personal funds, located a new transmitter site, secured an extension of the option on this new site, arranged for aerial photographing of the site and made the flight over the site despite her fear of flying, updated the applicant's estimated cost of operation, secured an equipment credit letter from RCA, changed the law firm representing the applicant, supplied over $10,000 of her personal funds to the applicant's savings account, contributed over $2,000 of her personal funds towards meeting expenses of the Central Westmoreland application, and assigned a $32,000 life insurance policy of her own as collateral in connection with the line of credit. After release of the Commission's order designating the Central Westmoreland application for hearing along with others, Mrs. Calisti resolutely refused to be persuaded by Mr. Calisti to dismiss the application because of his concern that a hearing on the designated issues would jeopardize his career in broadcasting. It should be noted that, with the exception of the matters previously discussed, Mr. Calisti has been of no assistance in the prosecution of the application.

17. Mrs. Calisti has been a real estate broker since 1964. Prior to that she had been in real estate for several years. As a real estate broker she has demonstrated competence to the point where her employer has left her in charge of the office in his absence. Her responsibilities in real estate have included office management and training and supervision of employees. She has been an officer of the local real estate broker's association and has received four annual awards from the Association for outstanding performance in sales. Her decision to continue the Jeannette application without her husband and to assume the responsibilities of general manager is totally consistent with her demonstrated competence in previous activities as described above.

18. It is particularly important to stress that Mrs. Calisti's impressive occupational achievements as well as the capable manner in which she has prosecuted the Central Westmoreland application (including the effective presentation of her testimony during the hearing) permit the Commission to rely on her to operate the proposed station independently of her husband. The record establishes that, despite the husband-wife relationship, Mrs. Calisti has become financially and professionally independent of Mr. Calisti. There is no evidence that Albert Calisti retains an undisclosed interest in the application. Hence, it is ultimately concluded that Albert Calisti need not be deemed to have an interest in the application of Central Westmoreland Broadcasting Company even though he has been of some assistance to her in the prosecution thereof out of the desire that she should succeed in

[22] Mrs. Calisti succeeded in obtaining the line of credit for Central Westmoreland whereas Mr. Calisti had not been able to accomplish this for Albert A. Calisti and Associates.

this endeavor. In arriving at this conclusion, the Examiner does not find it indicative of a hidden interest in Mr. Calisti that he and Mrs. Calisti have filed joint tax returns (there are obvious tax advantages in doing so); that Mrs. Calisti failed to file a Federal gift tax return (this in no way evidences an intent that Mr. Calisti is to share in the ownership of the proposed station); that Mr. Calisti remains liable on the mortgages for four pieces of property involved in the bank's loan commitment (in the event of foreclosure, the liability would be satisfied by resort to the properties and there is no apparent necessity for eliminating Mr. Calisti from the mortgages); that Mr. Calisti was initially required to execute the judgment note to secure the $50,000 loan commitment to Central Westmoreland (this proves no more than that Mr. Calisti at the time was willing to allow Mrs. Calisti to use his interest in the properties in order to obtain the loan commitment, and to subject his interest to possible foreclosure for her benefit);[23] and that Mrs. Calisti was mistaken in her testimony about certain aspects of the proposals (this shows nothing more than faulty recollection on the witness stand).

Representations and Criminal Record Issue

19. This issue has two parts, both of which are premised on a conclusion under Issue 2, that Albert Calisti is a party to the application. In view of the foregoing conclusion that Mr. Calisti is not a party to the application it is unnecessary to resolve this issue. It is noted, however, that if Mr. Calisti were found to be a party, the representations made by the applicant to the contrary would necessitate its disqualification without regard to the matter of the criminal record.

Cross-Interests Issue

20. The "cross interests" issue was designated at a time when Albert Calisti was general manager and chief engineer of WTRA in Latrobe. The Commission, noting that WTRA and the proposed Jeannette station would serve areas in common, indicated that Mr. Calisti's holding a position of "significant responsibility" at WTRA raised policy questions.

21. Mr. Calisti's status at WTRA has changed. He is no longer general manager and chief engineer. He is now a contract engineer and part-time salesman. These positions need not be regarded as having "significant responsibility" in the context of raising cross-interest policy considerations. They do not affect the program service or operating policies of WTRA. Under these circumstances, it is concluded that Mr. Calisti's present employment is not a bar to a grant of the Central Westmoreland application.

22. Mr. Seremet is also presently employed at WTRA but has indicated that he will leave that employment if the Central Westmoreland application is granted. Consequently, Mr. Seremet's present employment does not present a basis upon which to deny the Central Westmoreland application. It would be appropriate, however, to condition

[23] Moreover, the bank has since accepted a second judgment note signed solely by Mrs. Calisti.

a grant of the application upon cessation of Mr. Seremet's WTRA employment when the proposed Jeannette station commences operation.

Disposition on the Application

23. In light of the favorable conclusions reached above on the undisclosed interest and cross-interest issues, it has been concluded that the public interest would be served by a grant of Central Westmoreland's application for a Jeannette station, and that this application should be granted subject to the aforementioned condition.

In view of the foregoing, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of Verna M. Calisti and John K. Seremet, d/b as Central Westmoreland Broadcasting Company, for a new standard broadcast station in Jeannette, Pennsylvania, to operate on a frequency of 1530 kilocycles, with power of 1 kw (250 watts, Critical Hours), daytime only, IS GRANTED, subject to the condition that the employment of John K. Seremet with Station WTRA be terminated upon commencement of the operation of the applicant's proposed station. Before program tests are authorized, the permittee shall submit a complete nondirectional proof of performance which will include measured radials at 250, 260 and 270 degrees true to show that the radiation has been reduced to essentially 175 mv/m per kilowatt at one mile.

ISADORE A. HONIG,
Hearing Examiner,
Federal Communications Commission.

F.C.C. 73-281

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
COLDWATER CABLEVISION INC., COLDWATER TOWNSHIP, MICH.	CAC-55 MI035
COLDWATER CABLEVISION INC., QUINCY TOWNSHIP, MICH.	CAC-56 MI104
COLDWATER CABLEVISION INC., VILLAGE OF QUINCY, MICH.	CAC-57 MI103
COLDWATER CABLEVISION INC., COLDWATER, MICH.	CAC-1400 MI036
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1973; Released March 14, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. Coldwater Cablevision Incorporated, operator of cable television systems at Coldwater, Coldwater Township, Quincy Township, and Village of Quincy, Michigan,[1] all within the Kalamazoo-Grand Rapids-Muskegon-Battle Creek, Michigan television market (#37), has filed applications for certificates of compliance to add signals to the above-mentioned systems. For the system in Coldwater (CAC-1400), applicant has requested the following signal:

WKAR-TV (Educ., Channel 23) East Lansing, Michigan.

For the systems in Coldwater Township (CAC-55), Quincy Township (CAC-56), and Village of Quincy (CAC-57), the following signals have been requested:

WXON (Ind., Channel 62) Detroit, Michigan.
CKLW-TV (Ind., Channel 9) Windsor, Ontario.
WKAR-TV (Educ., Channel 23) East Lansing, Michigan.

The applications are unopposed. The signal of WKAR-TV is now carried on all four systems pursuant to special temporary authorization which required the systems' operator to file for subsequent certification. The systems have been authorized, in accordance with a number of previous Commission proceedings,[2] to carry the following television broadcast signals:

[1] Subscriber and population totals of the individual communities are listed respectively as follows: Quincy Township (53) 1755; Village of Quincy (243) 1540; Coldwater Township (266) 5841; Coldwater (2087) 9099.

[2] *Coldwater Cablevision, Inc.*, 4 FCC 2d 351 (1966); *Fetzer Cablevision, et al.*, 6 FCC 2d 845 (1967) and 8 FCC 2d 653 (1967); *Coldwater Cablevision, Inc.*, 26 FCC 2d 86 (1970), and *Coldwater Cablevision, Inc.*, 31 FCC 2d 17 (1971).

Coldwater	Coldwater Township	Quincy Township	Village of Quincy
WKZO–TV (CBS, Ch. 3) Kalamazoo, Mich	WKZO–TV	WKZO–TV	WKZO–TV
WNDU–TV (NBC, Ch. 16) South Bend, Ind	WNDU–TV	WNDU–TV	WNDU–TV
WJIM–TV (CBS, Ch. 6) Lansing, Mich	WJIM–TV	WJIM–TV	WJIM–TV
WKBD–TV (Ind. Ch. 50) Detroit, Mich	WKBD–TV	WKBD–TV	WKBD–TV
WOTV (NBC, Ch. 8) Grand Rapids, Mich	WOTV	WOTV	WOTV
WUHQ–TV (ABC, Ch. 41) Battle Creek, Mich	WUHQ–TV	WUHQ–TV	WUHQ–TV
WILX–TV (NBC, Ch. 10)[1] Onondaga, Mich	WILX–TV	WILX–TV	WILX–TV
WGTE–TV (Educ. Ch. 30) Toledo, Ohio	WGTE–TV	WGTE–TV	WGTE–TV
WSBT–TV (CBS, Ch. 22) South Bend, Ind	WSBT–TV	----------	
WXYZ–TV (ABC, Ch. 7) Detroit, Mich	WXYZ–TV	----------	
WKJG–TV (NBC, Ch. 33) Ft. Wayne, Ind	WKJG–TV	----------	
WSJV (ABC, Ch. 28) Elkhart, Ind	WSJV	----------	
WPTA (ABC, Ch. 21) Ft. Wayne, Ind	----------		
WANE–TV (CBS, Ch. 15) Ft. Wayne, Ind	----------		
WDHO–TV (ABC, Ch. 24) Toledo, Ohio	----------		
WSPD–TV (NBC, Ch. 13) Toledo, Ohio	----------		
WXON (Ind. Ch. 62) Detroit, Mich	----------		
CKLW–TV (Ind. Ch. 9) Windsor, Ontario	----------		

[1] All four systems were authorized to carry former educational Television Broadcast Station WMSB, Onondaga, Mich. (previously sharing channel 10 with station WILX–TV) which ceased operations when WKAR–TV began broadcasting on channel 23.

2. The addition of WXON and CKLW–TV to three of Coldwater Cablevision's systems is completely consistent with our signal carriage rules, as is the continued carriage on all four systems of WKAR–TV. Section 76.251(c) of our rules, however, requires a major market cable system operating prior to March 31, 1972, and wishing to add two distant independent signals to provide both public and educational access channels as well. Where three systems are proposing to add two distant independent signals, as is the case here, a total of six access channels would have to be provided. Coldwater Cablevision requests partial waiver of this section.

3. The four systems are served by a common headend, are geographically contiguous, and, it is argued, have common economic and political interests. The sharing of access channels under these circumstances was specifically envisioned in the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 359 (1972) and we have in the past permitted the practice upon proper showing. (See e.g. *Gerity Broadcasting Company*, 36 FCC 2d 69 (1972)). While Coldwater Cablevision's systems do, indeed, share a common headend, the systems' design makes it possible to provide the two "Coldwater" systems and the two "Quincy" systems with their own shared access channels. Thus the applicant has proposed to provide each pair of systems with a public access channel and an educational access channel.[4] The systems' operator proposes that the public access channel for each pair of systems, when not in use for its designated purpose, will carry automated weather information. Such a public access plan raises a question similar to that discussed in *Metro Cable Company* FCC 73–89, — FCC 2d —, where we expressed concern that the shared use of a public access channel with educational access material might have the effect of discouraging members of the public from asserting their right of access. We find that the mere carriage of automated weather information is not likely

[4] Access channels will be provided for the Coldwater system though there is no obligation to do so at this time. The addition of WKAR–TV pursuant to Section 76.61(d) does not invoke the access requirements of Section 76.251(c).

to have such a deleterious effect. However, out of an abundance of caution, we will require that, during periods where automated weather information is being carried, Coldwater Cablevision shall notify its subscribers that the channel being watched has been designated for public access and that the weather information will be pre-empted upon a request for public access.

4. Coldwater Cablevision proposes that each additional access channel, when not used by the local educational authorities for transmission of their own programming, may carry the distant signal of educational station WGTE–TV Toledo, Ohio (already authorized for all four systems). Of course, as in *Metro Cable Company* the decision to carry some or all of the programs of the distant educational station on the educational access channel will be left to the discretion of the local educational authorities. Such a scheme for the provision of access channels seems sensible and calculated to serve the needs of the four communities.

5. Although the production facilities for both public access channels will be located in the City of Coldwater, we note the most distant community is located within two miles of these facilities, and it would seem unreasonable at this time to require Coldwater to provide separate studios.

In view of Coldwater Cablevision's proposals described above, we find that the grant of certificates of compliance would be consistent with the public interest.

Accordingly, IT IS ORDERED, That Coldwater Cablevision Incorporated's request for waiver of Section 76.251 of our Rules IS GRANTED to the extent reflected herein; and

IT IS FURTHER ORDERED, That the applications (CAC–55, CAC–56, CAC–57, CAC–1400) filed by Coldwater Cablevision Incorporated ARE GRANTED and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
CAROL LOS MANSMANN, PITTSBURGH, PA.
Concerning Fairness Doctrine re Station
WIIC–TV

MARCH 14, 1973.

MS. CAROL LOS MANSMANN,
Attorney at Law,
1000 Lawyers Building,
Pittsburgh, Pa. 15219

DEAR MS. MANSMANN: This refers to your complaint against WIIC–TV, Pittsburgh, Pennsylvania, concerning its presentation of the abortion issue.

In a letter dated November 21, 1972 you stated that on November 12 at 10:30 p.m., a 30-minute unsponsored public affairs documentary entitled "Abortion: To Be or Not To Be" was broadcast by WIIC–TV; and that the documentary was "weighted in favor of abortion on demand," suggested abortion as "the only solution for the pregnant woman," and therefore was in violation of the fairness doctrine. You further stated that WIIC–TV did not "negotiate in good faith" with pro-life groups with respect to the presentation of views opposing abortion on demand, and that this was evidenced by the editorial distortion of statements by women representing the pro-life viewpoint to such an extent that they refused to allow their comments to be broadcast.

You stated that you are aware of the discretion granted licensees with regard to their programming; that the treatment of a controversial issue must be challenged on the basis of a licensee's overall programming; that your complaint is based on the total treatment afforded the abortion controversy by the station; that to your knowledge the only other WIIC–TV presentations on abortion consisted of one 2-minute pro-life statement and one 2-minute pro-abortion statement; and that, therefore, the documentary remains the sole evidence upon which to judge the allegation of a violation of the fairness doctrine with regard to the abortion question.

In a December 18, 1972 response to a Commission inquiry of November 29, WIIC–TV stated that it had afforded a reasonable opportunity for the broadcast of significant contrasting viewpoints on the controversial issue of abortion as evidenced by the following programming with regard to the subject—the documentary "Abortion: To Be or Not To Be," which presented contrasting viewpoints on the moral, medical, and legal aspects of the issue; the 30-minute discussion program "In Conflict," broadcast on Sunday, November 26 at 1:00 p.m. featuring Mrs. Mary Winter, President of Women Concerned

for the Unborn Child, who presented the anti-abortion position, and Ms. Jay Shiegg of the Abortion Justice Association who gave the opposing view; and the public affairs program "Face to Face," broadcast on Sunday, December 10 at 10:30 p.m., featuring a 30-minute appearance by Martin P. Muller, the legislator who sponsored the anti-abortion bill in the Pennsylvania legislature. The station also listed a number of "free speech messages" in which anti-abortion statements were broadcast.

The licensee further stated that it broadcast two editorials on abortion; that although it did not consider these to be pro-abortion in nature, it allowed anti-abortion responses by Mary Winter, Linda Howard of Pennsylvanians for Human Life (PHL), Judy Fink, minority member of the Pennsylvania Abortion Law Commission, and Barbara Rutkowski; and that since January 1, 1972 it has broadcast 49 news stories dealing with abortion; that 35 of these stories were neutral; 7 involved coverage of programs and events sponsored in favor of abortion; and 7 involved coverage of anti-abortion presentations.

In your reply to WHC–TV's response, received December 21, 1972, you state that the station did not respond to or deny any of the allegations regarding the documentary "Abortion: To Be or Not To Be"; that the program "In Conflict" was telecast after this complaint was filed; that this program did set forth contrasting views on narrow grounds, but that the discussion did not attempt to consider all aspects of the controversy; that the "free speech messages" were an attempt to side-track the public from the important issues of the controversy; that an example of this was identifying the pro-life movement with the Catholic Church by permitting a representative from the Holy Name Society of the Diocese of Pittsburgh to broadcast anti-abortion views; that pro-life spokesmen Mrs. Mary Winter, Mrs. Jean Garton, and PHL were denied "free speech time"; that Mrs. Rutkowski's two minute broadcast of pro-life views was not in response to this complaint and therefore can have no bearing on the present controversy; that the WHC–TV editorials were pro-abortion in nature; that Martin Muller's appearance on the program "Face to Face" was in conjunction with his candidacy for Governor of Pennsylvania and not as an anti-abortion proponent; that the interviewers were nevertheless hostile to his pro-life position; that news coverage per se is not pertinent to a discussion of whether reasonable opportunity was afforded for the presentation of contrasting viewpoints; and that only a reasonable amount of broadcast time given solely to the pro-life movement will suffice. You also request that WHC–TV furnish you and the Commission with the text of all relevant "free speech" messages, and station editorials.

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material.

However, the fairness doctrine provides that if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views in its overall programming which does include statements or

actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed, which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views.

The Commission has stated that the "critical issue is whether the sum total of the licensee's efforts, taking into account his plans when the issue is a continuing one, can be said to constitute a reasonable opportunity to inform the public on the contrasting viewpoints—one that is fair in the circumstances." *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283, 295 (1970).

As you acknowledge in your complaint, the broadcast licensee has considerable discretion in determining whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. This of course includes the selection of appropriate spokesmen. The Commission will review complaints only to determine whether the licensee's judgment has been reasonable.

The basis of your complaint is the telecast by WIIC–TV of the documentary "Abortion: To Be or Not To Be," which you state represents the sum of the station's programming on the abortion issue. However, WIIC–TV has provided a list of broadcasts on abortion in addition to the documentary. These programs appear to have presented contrasting views on various aspects of abortion. In this regard, the fairness doctrine does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign.

As to your request for transcripts of station "free speech" messages and editorials, there are no Commission rules or regulations which require a broadcast licensee to keep any scripts or tapes of its programs, nor is it required, if it does have such tapes or scripts in its possession, to supply them on the request of a listener, except in the case of a personal attack.

Accordingly, from the information before the Commission, it does not appear that the licensee's judgment in connection with the handling of the abortion issue has been unreasonable, and no further Commission action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division,
for Chief, Broadcast Bureau.

F.C.C. 73D–1

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of THE GERARDIN CORP.	Docket No. 19556 File No. 169–A–L–32
SPERRY AIR SERVICES, INC. For an Aeronautical Advisory Radio Station To Serve the Torrance Municipal Airport, Torrance, Calif.	Docket No. 19557 File No. 121–A–L–22

APPEARANCES

E. J. Alexander on behalf of The Gerardin Corp.; *R. G. Banister* on behalf of Sperry Air Services, Inc.; and *Terrence P. O'Brien, Esq.*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE LENORE G. EHRIG

(Issued January 10, 1973; Released Effective March 5, 1973 pursuant to section 1.276 of the Commission's rules)

PRELIMINARY STATEMENT

1. By Order released July 26, 1972, pursuant to the provisions of Section 309(e) of the Communications Act of 1934, as amended, and Section 0.331(b)(21) of the Commission's rules, the above-captioned applications were designated for hearing in a consolidated proceeding. Both applicants seek Commission authority to operate an aeronautical advisory station at Torrance Municipal Airport, Torrance, California. Section 87.251(a) provides that only one aeronautical advisory station may be authorized to operate at a landing area. Therefore, the applications are mutually exclusive. The designation order, except as indicated by the specified issues, found each of the applicants otherwise qualified.

2. The issues designated by the Commission are as follows:

(a) To determine which applicant would provide the public with better aeronautical advisory service based on the following considerations:

(1) Location of the fixed-base operation and proposed radio station in relation to the landing area and traffic patterns;

(2) Hours of operation;

(3) Personnel available to provide advisory service;

(4) Experience of applicant and employees in aviation and aviation communications;

(5) Ability to provide information pertaining to primary and secondary communications as specified in Section 87.257 of the Commission's rules;

(6) Proposed radio system including control and dispatch points; and

(7) The availability of the radio facilities to other fixed-base operators.

(b) To determine in light of the evidence adduced on the foregoing issues which, if either, of the applications should be granted.

3. A prehearing conference and hearing were scheduled and held in Los Angeles, California, on November 15, 1972. Previously, at the direction of the Administrative Law Judge exhibits and witness lists were exchanged by mail. Pursuant to agreement of the parties reached at the conclusion of the hearing, Bureau counsel filed proposed findings of fact and conclusions on December 14, 1972. The parties were given the opportunity to file reply findings on January 3, 1973, if they so desired. No filing was made.

FINDINGS OF FACT

4. Torrance Municipal Airport is presently served by an FAA airdrome control station which operates from 6:00 a.m. to 10:00 p.m. (0600 to 2200). Section 87.253 requires aeronautical advisory stations (Unicoms) at landing areas served by such FAA facilities to operate on the frequency 123.0 MHz. Section 87.257(d)(1) prohibits an aeronautical advisory station from transmitting information pertaining to the conditions of runways, wind conditions or weather information during the hours of operation of the airdrome control station or FAA flight service station.

Location of the Fixed-Base Operation and Proposed Radio Station in Relation to the Landing Area and Traffic Patterns [*Issue (a)(1)*]

5. The runways at Torrance Municipal Airport are 11L/29R, 11R/29L. Sperry Air Services occupies the front facing building on the Fairchild apron. The Unicom it proposes would be located in the northwest corner of the building. It would face a large window. Sperry would have clear vision of all of the runways and of their approaches. Gerardin is located to the west of Sperry and the Fairchild apron. Its main office does not command a view of the landing area. For the most part, however, Gerardin would be operating from its fuel center as long as qualified personnel are there. The fuel center is housed in an enclosed glass and aluminum building. From the fuel building both runways, the taxiway system, and the approach to runways 11 and 29R can be seen. Runway 29L is blocked by the Nagle's hangar.

6. The prevailing runway is 29. Both runways are lighted.

Hours of Operation [*Issue (a)(2)*]

7. Sperry's Unicom operation will be from 0600 to 2200. Gerardin had originally indicated that its hours of operation in the winter would be from 0800 to 1900 and, in the summer, from 0700 to 2100. Gerardin now anticipates, since they are pumping their own fuel, that their hours will be from 0700 to 2100 all year.

Personnel Available To Provide Advisory Service [*Issue (a)(3)*]

8. Sperry has a service manager who is going to be responsible for the operation of the Unicom. An assistant service manager will take additional hour requirements. In addition, Sperry has approximately 10 other employees.

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9. Gerardin would rely primarily on the head of the fuel facility area to operate the Unicom. He is a pilot with FAA instructor ratings. Gerardin has approximately 15 full-time employees. The pilots are on commission. They are paid for the time they fly and give instructions.

Experience of Applicant [*Issue* (*a*)(*4*)]

10. Sperry Air Services has been in operation since November 1969 and has operated an Aviation Instructional Station, call letters WLG–4, on 123.3 MHz, since 1970. In addition, Sperry operates a Citizens Band radio for the dispatch of its fuel trucks. Sperry has trucks and facilities that are presently in operation. "They have the mobile fueling agreement with the City that selects the trucks going anywhere on the airport." Based on his investigation, the Airport Manager recommended to the Airport Commission of the City of Torrance that Sperry be endorsed for a Unicom license. The Airport Commission concurred in this recommendation and endorsed Sperry.

11. Gerardin has no radio stations that are aviation oriented. Mr. Steven Alexander, a principal in the organization, has an amateur station license. Gerardin is operating an FAA/VA approved flight school for fixed-wing aircraft and helicopters. In addition, a DOT/FAA approved (Certificate Number 405–39) radio repair station and an aircraft maintenance facility are operated on a seven-day-a-week basis.

Ability To Provide Information [*Issue* (*a*)(*5*)]

12. Sperry plans to establish a direct wire line service with the control tower so that the aviation public will have direct access to FAA flight information. Sperry has a fuel truck and provides fuel to transients on the landing area. The station will provide the scope of service defined in Section 87.257 of the Commission's rules. Sperry has entered into a "tentative agreement" to provide space for a radio repair station in order to comply with the requirements of its Piper dealership. An aircraft maintenance service is available five and a half days a week from approximately 7:30 a.m. to 5:00 p.m. Two mechanics are on call at all other times. As shown in Sperry Exhibit No. 5, a console offering direct access to motels, restaurants, taxis and rent-a-car service may be available if sufficient advertising space is sold.

13. Gerardin's employees have read and understood Section 87.257 of the Commission's rules. Its employees will provide information pertaining to primary and secondary communications as specified in Section 87.257. Gerardin has a fuel truck but it can only service its own aircraft at this time because of Torrance regulations which require a pumping facility to be in service one year from a fixed facility prior to starting mobile facilities. Gerardin's fixed fuel pump can serve other aircraft. Secondary communication information concerning such matters as fuel, motels and taxicabs, will be handled by the girls in the office. There would be a wire line between the fuel area and the main office.

Proposed Radio System [*Issue* (*a*)(*6*)]

14. The Sperry radio system will include the following equipment:

(a) Transceiver: Radair 10; Frequencies: 123.0 Unicom—Voice; 121.5 Emergency only.
(b) Antenna: Shielded Dipole 118.0 to 135.0 Maz.
(c) Microphone: Astatic Model G.
(d) Speaker.

The control and dispatch point will be located in the Sperry Air Services, Inc. Guest Center, on the main flight line ramp.

15. Gerardin proposes to use a Genave Alpha/105 transmitter rated at 2 to 3 watts. The frequency will be 123.0 MHz and the bandwidth and emission, 6A3. The primary control point will be in the fuel center office under the antenna. The secondary control point will be in the main office building.

Availability of Radio Facilities to Other Fixed-Base Operators [*Issue* (*a*)(*7*)]

16. If Sperry is the successful applicant, it would extend the privilege of a dispatch point to Gerardin so that Gerardin could utilize the Unicom facility. If Gerardin is the successful applicant, it would extend the privilege of a dispatch point to Sperry so that Sperry could utilize the Unicom facility.

CONCLUSIONS

1. The location of Sperry is slightly superior to that of Gerardin in that it affords better observation of the landing area. This is especially true when Gerardin is operating from its main office. However, FAA airdrome control service is available at the Torrance Airport during the hours when both applicants would be in operation. Therefore, the decisional significance of this advantage is diminished.

2. Sperry's primary operating hours will be from 0600 to 2200. Gerardin, on the other hand, proposes to operate from 0700 to 2100. Thus, Sperry will provide the public with two more hours of service daily. A comparative preference is found for Sperry.

3. Both applicants have sufficient personnel to operate an aeronautical advisory station during their normal working hours. No comparative preference exists for either applicant.

4. Sperry has operated an Aviation Instructional Station (WLG–4) at Torrance since 1970. In addition, it operates a Citizens Band station for its fuel trucks. The Torrance Airport Commission has endorsed Sperry to be the licensee of the Unicom. Gerardin has no aviation oriented radio station experience. A decisional preference is found for Sperry.

5. Both applicants have the ability to provide information pertaining to primary and secondary communications as specified in Section 87.257 of the Commission's rules. Inasmuch as observation of the runways is not of major importance because of FAA facilities, no comparative preference is found for either applicant.

6. The radio systems proposed by each are standard and there do not appear to be any innovative plans by either party which would point to a comparative preference on this score.

7. Each party is willing to offer the other dispatch point facilities. Accordingly, no comparative preference exists on this issue.

In light of the foregoing and because it appears that the public interest, convenience and necessity will be served, IT IS ORDERED that unless an appeal is taken from this Initial Decision to the Commission by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the rules, the application of Sperry Air Services, Inc., for an aeronautical advisory station to serve the Torrance Municipal Airport at Torrance, California, IS GRANTED, and the application of The Gerardin Corp. for the same facilities IS DENIED. The grant to Sperry Air Services is conditioned on Sperry's seasonably entering into good faith negotiations with Gerardin for a dispatch point for Gerardin.

LENORE G. EHRIG,
Administrative Law Judge,
Federal Communications Commission.

F.C.C. 73R-109

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of INDUSTRIAL BUSINESS CORP., OGALLALA, NEBR.	Docket No. 19559 File No. BPH-7317
OGALLALA BROADCASTING CO., INC., OGALLALA, NEBR. For Construction Permits	Docket No. 19560 File No. BPH-7364

MEMORANDUM OPINION AND ORDER

(Adopted March 12, 1973; Released March 14, 1973)

BY THE REVIEW BOARD:

1. Before the Review Board for consideration is a motion to enlarge issues, filed October 26, 1972, by Ogallala Broadcasting Company, Inc. (OBC).[1] The mutually exclusive applications of OBC and Industrial Business Corporation (Industrial) were designated for hearing by Commission Order, FCC 72-667 (37 FR 16123, published August 8, 1972), which specified financial issues against both applicants and a standard comparative issue. OBC now requests the addition of "economic dominance" and lack of candor issues against Industrial.

ECONOMIC DOMINANCE ISSUE

2. In support of this request, OBC asserts that Industrial's application reveals that nine of its thirteen stockholders (owning 68% of the stock) are officials of the two largest employers in the community of Ogallala, Nebraska.[2] Moreover, alleges OBC, all but one of the officers and directors of Industrial are officers or officials of those two companies. "These statistics alone," asserts petitioner, demonstrate "a degree of economic dominance of major proportions." OBC concludes that such dominance permits Industrial's principals to exercise a "pervasive influence" over the lives of the citizens of the area, such control being exercised "in subtle and unseen ways, such as participation in governmental affairs, influence in connection with governmental deci-

[1] Also before the Board are: (a) errata, filed October 27, 1972, by OBC; (b) Broadcast Bureau's opposition, filed November 8, 1972; (c) opposition, filed November 20, 1972, by Industrial; (d) errata to (c), filed November 21, 1972, by Industrial; (e) errata to (c), filed November 28, 1972, by Industrial; (f) reply, filed December 8, 1972, by OBC; (g) errata to (f), filed December 12, 1972, by OBC; (h) supplement to (f), filed December 14, 1972, by OBC; (i) letters, received December 18, 1972, and January 5, 1973, from Industrial; (j) motion to strike (f) and comments, filed January 18, 1973, by Industrial; (k) errata to (j), filed January 24, 1973, by Industrial; (l) supplement to (j), filed January 26, 1973, by Industrial; (m) opposition to (j), filed February 6, 1973, by OBC; (n) reply to (m), filed February 27, 1973, by Industrial.

[2] OBC asserts that Thompson Ramo Wooldridge, Inc. and Good-All Electric Company (Good-All) employ almost 89% of all the persons, excluding government and educational employees, employed by "major" employers in Ogallala. Industrial argues that if all such employees are considered, the companies employ only 30% of that work force. Both parties base their arguments on a pamphlet entitled "Industrial Facts/Ogallala, Nebraska", published by the Industrial Development Department of the Nebraska Public Power District. Dated June, 1972, it contains, *inter alia*, economic statistics of the area.

sions and 'persuasion' through the use of economic leverage or by virtue of their position [sic] as employers." Industrial and the Broadcast Bureau oppose the petition.

3. The Review Board will deny the requested issue. The petition is untimely, filed two months after the expiration of the time limitation specified by the Commission's rules. See Rule 1.229(b). Furthermore, no good cause exists for the late-filing. All the information presented as the basis for the request was known by or available to petitioner well prior to the limit for filing established by the rules.[3] Moreover, the mere unsupported, conclusory statement that a major employer in a community seeks to influence that town's economy and the lives of its citizens is insufficient to raise the issue. The petition contains neither specific allegations of fact nor affidavits by persons having personal knowledge thereof. See Rule 1.229(c). In sharp contrast, the cases cited by OBC clearly reveal that the parties in those cases either virtually owned and operated the community (*Hershey Broadcasting Co., Inc.*, FCC 62–232, 22 RR 1070) or provided almost the entire employment for the community and participated, as well, in many other aspects of community life (*Midland Broadcasting Company*, 12 FCC 611, 3 RR 1961 (1948)).

4. OBC's reply pleading, to the extent that it contains wholly new and previously unmentioned allegations of fact, will be dismissed. See Sections 1.45 and 1.294 of the Rules.[4] A petitioner will not be permitted to attempt to cure an otherwise defective petition where information contained in its reply pleading was readily available and could have been included in the original petition to enlarge issues. To allow the reply to thus serve the purpose of the original petition would be to either (a) effectively render meaningless provisions in the rules for a fair opportunity by another party to respond to allegations or (b) compel the addition of supplementary pleadings not ordinarily contemplated by the rules.[5] The results of a party's attempts to do so are clearly seen in the instant case, where pleadings have proliferated and, notably, it has taken from October 26, 1972, until February 27, 1973 just for filings before the Board to be completed. Orderliness, expedition and fairness in the adjudicatory process require that reasonable procedural limits be established and maintained; here, those limits have been exceeded.

MISREPRESENTATION ISSUE

5. OBC claims that Industrial utilized U.S. Census data [6] to oppose a rule making petition before the Commission,[7] when, in fact, Indus-

[3] The amendment to Industrial's application revealing the business interests of its principals was filed August 2, 1971. Also, we find unconvincing petitioner's claim that a pamphlet of employment statistics provided the first indication of the alleged "pervasive" control of which OBC complains. In any event, the booklet (see note 2, *supra*) was available four months prior to the filing of the instant petition. We find fallacious petitioner's contention that since "an applicant would not recognize such a matter to be of Commission concern", good cause existed when the potential issue was first recognized by counsel in his preparation for hearing.

[4] Sections 1.45 and 1.294 state that replies "shall be limited to matters raised in the oppositions". We reject OBC's argument that the rules only prohibit the raising of issues not contained in the original petition to enlarge.

[5] In this regard, see the Review Board's *Public Notice* No. 90836, released October 11, 1972 (Filing of Supplemental Pleadings Before the Review Board).

[6] Data used was from the 1960 and 1970 U.S. Census and from the 1958 and 1967 U.S. Census of Business.

[7] On April 25, 1972, OBC filed a Petition for Rule Making (RM–1970) requesting that a second FM channel be allocated to Ogallala, Nebraska. Industrial filed an opposition to the petition on June 12, 1972.

trial possessed more current but less advantageous information. The information is allegedly contained in the pamphlet, "Industrial Facts/ Ogallala, Nebraska". (See note 2, *supra.*) Failure to provide the Commission with this information, maintains OBC, constitutes lack of candor and warrants an appropriate issue.

6. The Review Board is of the view that the requested issue is not warranted. As noted in paragraph 3, *supra*, the petition is untimely. Also, good cause existed, if at all, when the allegedly newly discovered information, *i.e.*, the "Industrial Facts" booklet, became available to petitioner in June, 1972, not when the party gave such material to its counsel in October of that year. Moreover, aside from the untimeliness, based on the pleadings before us, we do not believe that the allegations raise a substantial question regarding Industrial's candor. The Broadcast Bureau, in its opposition, has pointed out that the pamphlet in question was distributed on or about June 29, 1972, approximately 2½ weeks after Industrial filed its opposition to the petition for rulemaking. OBC has presented no evidence tending to show that the report was available to Industrial prior to that time. OBC also fails to support its assertion that since two Industrial principals are members of the Ogallala Civic Improvement Association, Inc. (OCIA) [8] and since they knew that such a booklet was being prepared, it is "simply inconceivable" that those principals did not also know, prior to publication, the basic information that was to be contained in the booklet. We do not believe that such a conclusion must be reached simply because Van Every gave information to the Nebraska Public Power District about the organization and operation of the OCIA and was referred to in the booklet as one of the persons to contact for more information about Ogallala. Industrial has also submitted an affidavit by Van Every, wherein he states that he had neither any part in the publication of "Industrial Facts" nor any idea of what facts it would contain. We find unconvincing petitioner's argument that affiant's failure to state that he did not know the facts contained in the booket (as contrasted to whether they would be included) implies that Industrial did submit data it knew to be wrong. We also do not believe that the "local business experience" of Industrial's principals adequately supports OBC's claim that those principals knew that the U.S. Census data was outdated and erroneous when it was submitted by Industrial. Finally, OBC's reference to the disparities between retail sales statistics "according to sales tax data provided by Nebraska Department of Revenue" contained in an Industrial exhibit and the U.S. Census data it submitted in the rulemaking proceeding does not necessitate the addition of the requested disqualifying issue. We agree with the Broadcast Bureau that, under the circumstances here, Industrial did not go beyond the bounds of legitimate advocacy.

7. Accordingly, IT IS ORDERED, That the motion to strike, filed January 18, 1973, by Industrial Business Corporation, IS GRANTED, and the reply, filed December 8, 1972, by Ogallala Broadcasting Company, Inc., IS DISMISSED to the extent indicated herein; and

[8] Russell Van Every, an Industrial principal, is president of the Association. Composed of over 180 citizens and businesses in Ogallala, it is, alleges OBC, the only industrial and profit oriented development organization in Ogallala.

8. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed October 26, 1972, by Ogallala Broadcasting Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-307

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of: PONCE TELEVISION CORP. (WRIK-TV), PONCE, P.R. For Construction Permit	Docket No. 19459 File No. BPCT-4421

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 21, 1973)

BY THE COMMISSION:

1. This proceeding was initiated by our Memorandum Opinion and Order and Notice of Apparent Liability, FCC 72-198, 33 FCC 2d 940, released March 9, 1972, which designated the above-captioned application for evidentiary hearing. Presently before us are the following matters: (a) a petition for reconsideration of hearing order or for clarification of issues filed April 10, 1972, by WAPA-TV Broadcasting Corporation (WAPA-TV); (b) comments filed May 10, 1972, by the Chief, Broadcast Bureau (Bureau); (c) a request for dismissal of application and petition for reconsideration filed May 10, 1972, by Ponce Television Corporation (PTC); (d) a response to (c) above filed June 15, 1972, by the Bureau; (e) a reply to the Bureau's response filed June 27, 1972, by WAPA-TV; and (f) another reply to the Bureau's response filed July 14, 1972, by PTC.

2. Certain developments have substantially altered the posture of this proceeding since it was last before us. Briefly stated, those developments are: (a) that during a prehearing conference held on June 14, 1972, PTC's request for the dismissal of its above-captioned application was considered by the presiding Administrative Law Judge; (b) that by Order (72M-788) released June 16, 1972, the application was dismissed with prejudice; and (c) that in view of the foregoing, the only matters now remaining for resolution concern the Notice of Apparent Liability and the related hearing issue which were incorporated in our designation order.[1] The above developments have also rendered moot certain requests in the pleading here under consideration.[2] However, other matters contained in these pleadings require resolution on their merits, and they are treated herein.

[1] Issue No. 6 reads: "To determine whether PTC has moved the main studio of Station WRIK-TV from Ponce to San Juan, Puerto Rico, without prior Commission approval as required by Section 308 of the Communications Act of 1934, as amended, and Section 73.613(b) of the Commission's Rules and, if so, whether any such violation was willful or repeated." With respect to this issue we stated that a forfeiture could be imposed in an amount up to $10,000, if it is determined that PTC has willfully or repeatedly violated Section 308 of the Act or Section 73.613(b) of the Rules.

[2] These include PTC's request for dismissal of its application and certain matters in the WAPA-TV petition for reconsideration of hearing order or for clarification of issues which are directed to the already dismissed PTC application.

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3. PTC urges us to resolve without an evidentiary hearing the Notice of Apparent Liability against Station WRIK. Essentially, it is PTC's position that there is now no need for a hearing because its application for improved facilities has been dismissed, it has responded to all of the allegations which formed the basis of the Notice of Apparent Liability, and its responses have substantially resolved, in PTC's favor, all of the factual questions surrounding the alleged improper operations of Station WRIK. The Bureau opposes the request, arguing that PTC has not substantially satisfied all of the serious public interest questions which prompted the Commission to issue the Notice and that a hearing is necessary in order to resolve these significant matters, irrespective of the disposition of the PTC application.

4. We have repeatedly stated that in order to obtain reconsideration of a designation order, the questions raised by the hearing issues must be substantially satisfied. *Cf. Camel Company*, 16 FCC 2d 871 (1969). In our opinion, PTC has not met this test. We agree with the Bureau that PTC's request is grounded in major part upon a restatement of the information which was before the Commission prior to its designation order. That information was insufficient to resolve in PTC's favor all of the serious public interest questions surrounding Station WRIK's past operations, and we do not believe that such matters can now be resolved on the basis of written pleadings to the exclusion of an evidentiary inquiry where all of the parties' conflicting allegations can be adduced and weighed.

5. Nor do we believe that such an inquiry can be reasonably conducted without the full participation of WAPA–TV.[3] The Commission's Notice of Apparent Liability was based principally upon allegations made by WAPA–TV and upon PTC's failure to respond satisfactorily thereto. Consequently, we are persuaded that WAPA–TV's further participation in this proceeding is required.

6. In the designation order in this proceeding, the Commission specifically stated that entertainment and sports programs were to be excluded from the overall consideration of Station WRIK's programming in determining whether or not that station has moved its main studio without prior approval. WAPA–TV seeks reconsideration of the above ruling, contending that the exclusion of such programming will unduly limit the scope of the evidence relevant to any reasoned determination of whether or not Station WRIK has been operating primarily as a San Juan station rather than a Ponce station. We disagree. While WAPA–TV may be correct that Station WRIK originates more of its entertainment and sports programs from San Juan than from Ponce, what WAPA–TV has ignored and what was made clear in the designation order is that Station WRIK has been authorized to operate in such a manner because of the superior Spanish-language entertainment industry and other relevant factors available in the San Juan area *vis a vis* the Ponce area (*Nationwide Communications, Inc.*, 18 FCC 2d 171 at paragraph 4). It is for this reason that the Commission determined that it would be inappropriate to consider

[3] In the pleadings here under consideration, WAPA–TV has indicated that its participation in this proceeding does not appear necessary since all of the information it had or knew about concerning Station WRIK has already been submitted to the Commission.

such programming in the context of this particular proceeding, and we find no reason to hold otherwise.

7. Accordingly, IT IS ORDERED, That the request for dismissal of application filed by Ponce Television Corporation IS DISMISSED as moot and its petition for reconsideration IS DENIED.

8. IT IS FURTHER ORDERED, That the petition for reconsideration of hearing order or for clarification of issues filed by WAPA–TV Broadcasting Corporation IS DENIED to the extent indicated herein and DISMISSED as moot in all other respects.

9. IT IS FURTHER ORDERED, That WAPA–TV Broadcasting Corporation IS DIRECTED to appear and to participate in the evidentiary hearing of this proceeding.

BEN F. WAPLE, *Secretary.*

F.C.C. 73-244

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST FOR WAIVER OF THE PRIME TIME ACCESS RULE (SEC. 73.658(k)) FILED BY CHILDREN'S TELEVISION WORKSHOP (CTW)

MEMORANDUM OPINION AND ORDER

(Adopted March 2, 1973; Released March 20, 1973)

BY THE COMMISSION: CHAIRMAN BURCH CONCURRING AND ISSUING A STATEMENT IN WHICH COMMISSIONERS WILEY AND HOOKS JOIN; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission here considers a "Petition by Children's Television Workshop" (CTW), filed on November 29, 1972, by Children's Television Workshop (CTW), asking for waiver of the prime time access rule to permit the network presentation on one night a week at 7:30 PM E.T. of a CTW-produced children's program series, without counting toward the permissible three hours of network programming that evening. We also consider here a number of responsive comments concerning the petition, timely filed, pursuant to the procedure set forth in a Public Notice of the filing of the petition, issued December 20, 1972 (FCC 72-1173); and CTW's reply to these comments.

2. CTW, which has been the producer of the two highly regarded children's programs *Sesame Street* and *Electric Company*, carried generally on public television stations, contemplates the production of a full year's series (26 original episodes, 26 repeats) of a program designed for children 6–12, to increase a child's psychological awareness, both of his own thoughts and feelings and those of others. CTW hopes to start production very soon so as to be able to have it shown starting about January 1974. It is estimated that the series will cost some $3,000,000, of which $500,000 is required at the beginning for developmental work. CTW has had conversations with one of the three national commercial networks (it appears from the response that it is ABC), concerning the presentation and financing of this series. The network has expressed interest. However, according to the petition, one major problem is that the network would have to make some financial sacrifice at best to back and present the series, including the money advanced for production, the limited revenue obtainable from limited sponsorship of the program, and (possibly) some loss later in the evening from the limited value of this program as a "lead-in". CTW believes that, while it can work out the arrangements, in order to do so it must be able to assure the network that the program can be presented at 7:30 *in addition to* the regular three hours of network material that evening, rather than the network's being required to

present the program *instead of* a half-hour of regular material. Otherwise, the network would be making even more of a sacrifice. It is stated that presentation at 8:00 PM or later is undesirable if not impossible. Therefore waiver is sought to "introduce a whole new concept in evening programming". It is also stated that the funding of the program otherwise is not possible from the limited resources of CTW and the public television stations with whom it has up to now been associated.

3. CTW states that the resolution of the over-all prime time access rule proceeding now pending, Docket 19622, will take an extended period, and that the development of this program—which should serve as a valuable experiment in indicating what is possible in prime time—should not be required to come to a halt during this period. Therefore it asks for a prompt grant of waiver in advance of the over-all decision in that proceeding.

4. Comments concerning the petition were filed by ABC, the network involved, and also by Eastern Educational Network (EEN), CBS, Westinghouse Broadcasting Co., Inc. and the National Association of Independent Television Producers (NAITP). Other than ABC (whose comments are discussed below), the parties generally opposed the petition, at least for the time being or in the absence of a further showing. EEN, a regional network of some 42 public television stations in the Northeast, states that before grant of this waiver is considered, CTW should be required to give more information as to why financing from public television sources is unavailable, noting that CTW likely will receive considerable sums approved by the Corporation for Public Broadcasting for new programming in the health field. It is also urged that in view of CTW's traditional association with public TV, it should be required to disclose any inhibitions or limitations (legal or philosophic) upon its proposed commercial venture. Absent such disclosures, it is claimed that grant of the request would be a dangerous and unfortunate precedent, which could harm public broadcasting's development by depriving it of one of its most successful programming sources. This should not be done without compelling justification.

5. *Westinghouse* states that it opposes action at this time, in advance of the over-all decision in Docket 19622, since this is the type of matter to be considered therein (children's programming being specifically mentioned in the Notice), and any separate earlier decision would unnecessarily fragment the Commission's consideration of that over-all proceeding, and possibly involve pre-judgment of the issues in it. *CBS* "reluctantly opposes" the CTW request, on the basis of "constitutional and philosophical considerations." These concepts are said to be involved in any Commission action involving consideration of programs on the basis of their "distinctive character"—essentially the kind of thing the Commission got into in its actions concerning "off-network" waivers in 1972 (*Wild Kingdom*, *Lassie*, *National Geographic and Six Wives of Henry VIII*), where various parties urged that the programs were "ideal for family viewing", of great value to children, etc. It is pointed out that Commissioners on both sides of the question in these cases regarded these judgments as turning on the Commission's view of program "quality". It is asserted that waiver

here would be very difficult to distinguish from waiver for other programs of at least some significance to children, such as CBS' *The Waltons*, *Young People's Concerts*, *National Geographic*, *You are There*, *House Without a Christmas Tree*, *Tom Sawyer*, *Treasure Island*, the former *Lassie* series, etc.—a "continuum of programs". In short, program choice is for licensees; the Commission should not attempt to regulate on the basis of its ideas as to what is a "good" program.

6. *NAITP*, the independent producers' association, makes much the same arguments as CBS and Westinghouse, mentioned, including the assertion that this request, if granted, might lead to a host of other "interim" requests pending the decision in the over-all proceedings, and thus would serve to weaken or destroy completely the rule, even without formal repeal of it in the over-all proceeding. It is also urged that what is sought here is a decision *in vacuo*, without any specific idea at all of what will be involved in the program. NAITP also urges that the proposed hour—7:30 PM—is *not* the best time for the scheduling of a program aimed more or less exclusively for young children (which is 4:30–5:00 PM), and while it may be best for "family" viewing, there is already plenty of "family" material around. NAITP is inclined to question the real identity of the party seeking the request, believing that it might be the network, willing to give away someone else's time rather than sacrifice any of its own. It is claimed that the network's increasing profits at the present time belie any claim of "poverty" making it necessary to use access time, rather than network time, for such an enterprise. In short, as in its lengthy comments in Docket 19622 proceeding (incorporated by reference here) NAITP questions "network motivation". It is asked that the request be denied or deferred.

7. *ABC* in its comments addresses itself chiefly to the "limited sponsorship" basis on which CTW proposes to present the program, discussed in its petition, with commercials only in groups at the beginning and end of the program, and these "of an institutional nature" rather than trying to sell products to children. ABC states that while it is interested in the program proposal and hopes it will be possible for the series to be on ABC, the series will be very expensive, and ABC questions whether under these restrictions ABC could justify the investment and substantial loss which would be involved even after production. While it believes placement on this basis might be possible, it states that CTW's sponsorship ideas may not be realistic, and urges the Commission, if it is disposed to grant the waiver, not to condition it on any such restrictions on sponsorship, which might have the practical effect of denying the program to the public because of lack of funding.

8. In reply to these comments, CTW asserts the *independence of the source and character of the proposed program*, the very material which it is the objective of the rule to further, and which was one of the chief considerations in the waiver actions mentioned above. As to the contention that action now would be "premature", CTW claims that rather than postponing decision on its request till the over-all decision (or "indefinitely"), the public interest is better served by enabling this "unique breakthrough in children's programming" to get started *now*, which, among other things, will give the Commission information on

the operation and effect of such a prime-time program. As to EEN's contention concerning the impact on public television efforts, CTW assures public television interests that it will continue to cooperate with them in the future; but its proposed CPB grant is for a different program, and it continues to believe that the proposed program is not possible if funds from such sources are to be primarily relied on. With respect to ABC's arguments about sponsorship limitations, CTW states that the limited sponsorship arrangements mentioned in its petition are not suggested as necessary preconditions to Commission grant, but they do represent "the type of sponsorship to which CTW is committed in offering this program for commercial sponsorship."

CONCLUSIONS

9. On careful consideration of the foregoing matters, we are of the view that decision on the CTW request *at this time*—in advance of the decision in the over-all rule-making proceeding—is not appropriate. As mentioned by some of the opposing parties, above, this involves some of the matters under consideration in the general Docket 19622 proceeding, which specifically included the question of whether different approaches should be taken as to children's programs (as well as to various other types of material). Despite what may well be the merits of the CTW proposal, it does not appear sound to reach a fragmentary decision as to it alone, which would involve, at least possibly, a pre-judgment of the issues in that proceeding. It is to be noted that we do *not* contemplate that the proceeding will be pending for "an extended period". As repeatedly stated, we hope and intend to decide this over-all matter by fairly early this spring. If it appears that, for some unexpected reason, it cannot be resolved by about May 15, our present action holding decision on the CTW request in abeyance will be reviewed.

10. In view of the foregoing, IT IS ORDERED, that the "Petition by Children's Television Workshop" filed November 29, 1972, seeking waiver of the prime time access rule, IS HELD IN ABEYANCE pending decision in the over-all proceeding concerning that rule, Docket 19622.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF CHAIRMAN BURCH IN WHICH COMMISSIONERS WILEY AND HOOKS JOIN

I am reluctant to postpone consideration of what looks to be a most serious and worthwhile proposal in the area of children's programming on commercial network evening programming—indeed, perhaps a long-sought breakthrough. But despite my great admiration for Children's Television Workshop and what it can and has accomplished in this vital area of public service, I do not think it appropriate to make the crucial judgment here on a *waiver* basis—on the decision of a majority of seven Presidential appointees in Washington as to whether this particular program series should be given a "green light" for national network viewing. For the power to allow a particular

program to survive by waiver carries with it the power to keep off the air that which does not win favor with a majority of the Commission. As I have pointed out before, the prime time access rule has led inevitably to such judgments in the past. Here, however, we appear to have a better alternative—namely, judgment in the context of the overall proceeding in Docket No. 19622. Further, by proceeding in this fashion, we maintain the *status quo* pending the decision in 19622—unlike the case of "Wild Kingdom" also just decided.

I have therefore concurred in the majority action. I do so with two important reservations: (i) that the decision in 19622 will be forthcoming in a few months; and (ii) that this particular matter will be considered and promptly disposed of at the same time. I would stress that if there is any significant slippage in this schedule, our action today should and must be reviewed.

F.C.C. 73-296

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
PETITION OF MUTUAL INSURANCE CO. OF OMAHA FOR WAIVER OF THE "OFF-NETWORK" PROVISIONS OF THE PRIME TIME ACCESS RULE (SEC. 73.658(k)(3)) IN CONNECTION WITH ITS "WILD KINGDOM" PROGRAM

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 20, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND JOHNSON DISSENTING; COMMISSIONER H. REX LEE DISSENTING AND ISSUING A STATEMENT; COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission here considers a "Petition for Extension of Waiver of the Prime Time Access Rule" filed on January 10, 1973, by Mutual Insurance Company of Omaha (Mutual), in connection with its *Wild Kingdom* television program series. Basically, Mutual seeks a continuation of the waiver granted for this program for the 1972–73 broadcast year (until October 1, 1973),[1] so as to cover the 1973–74 year (to October 1, 1974). However, as discussed below, in its reply to oppositions, Mutual states that in addition to presenting 12 programs in the 1973–74 series which will be new to television, Mutual will also include 6 programs not previously shown on network television (i.e., programs originated during the 1971–72 and 1972–73 years), for a total of 18 out of 52 programs which would not be "off-network" material whose presentation during the "cleared" portion of prime time is prohibited under Section 73.658(k)(3) of our rules. We also consider here four comments opposing the petition, discussed below, and Mutual's reply to these oppositions.

2. In support of its request for continuation of the waiver, Mutual urges largely the same points previously advanced in its original request and noted by us in acting on it (footnote 1, supra): the high popularity and asserted merit of the program, particularly for children's and "family" viewing at an early evening hour, and, more important, its character as an *independently produced and controlled program*, unlike most network material, and thus the very type of programming which the "prime time access rule" was designed to en-

[1] *In the matter of Mutual Insurance Company of Omaha*, FCC 72-114 (February 1972), 33 FCC 2d 583.

courage.[2] It argues, as before, that thus this was never the type of material to which the rule was intended to apply and that exemption, rather than waiver, would be appropriate. Mutual claims that the same equities which were found to warrant waiver before still pertain; and that it needs the vast audiences available in prime time to justify the substantial expense involved in producing new programs. It is also urged, as before, that the uncertainties involved in production of "wild life" programs of this sort prevent the addition of new material on a larger scale; and that intensive use of replays of the existing material which is not "off-NBC"—that produced in 1971–72 and 1972–73—would not be in the public interest now, since it means replays within too short a period to have maximum audience appeal, so that Mutual rather contemplates largely use of older, "off-network" episodes in addition to the new material.

3. It is also urged that, while a general proceeding concerning the whole prime-time access rule (including the matter of waivers) is pending, Docket 19622, the Commission should act favorably *now* on Mutual's request. Mutual asserts that all it is asking is continuation of the *status quo* for another year, which will not harm the Commission's evaluation of the impact of the rule, and that the Commission recognized in its 1972 decision that any infringement on prime-time availability to non-network sources which would result from this waiver is minor, and offset by the likelihood that without waiver this program itself could not continue. It is claimed that this is still true; and that Mutual must make its plans for this fall as soon as possible, so as to make the necessary commitments for program development.

4. Four parties filed comments opposing the petition: Columbia Broadcasting System, Inc. (CBS), which basically opposes the prime time access rule; and National Association of Independent Television Producers, Inc. (NAITP), Metromedia Producers Corp. (Metromedia, a wholly-owned subsidiary of Metromedia, Inc.), and Westinghouse Broadcasting Company, Inc. (Westinghouse), all of them vigorous supporters of the basic prime time access rule. CBS basically opposes waiver on the ground that it necessarily involves a Commission judgment—inappropriate and assertedly illegal—on the *merit* or *distinctive character* of a program, contrary to the basic regulatory scheme envisaged in the Communications Act. It is pointed out that, while the *Wild Kingdom* decision of 1972 was based largely on the *independent* character of the program when it was on the network, in a subsequent decision the Commission refused waiver to the *Lassie* program even though it was much the same in this respect, making a "factual-fictional" distinction.[3] This is said to illustrate the basic problem inherent in this kind of determination—which assertedly rests

[2] In paragraph 2 of the February 1972 decision mentioned in footnote 1, above, we noted that the *Wild Kingdom* series was conceived and produced initially by an independent producer, who sold to NBC the right to network exhibition only (no other rights); and that Mutual became the sponsor and later, in November 1968, acquired the program entirely, thereafter paying NBC only for the network time used in the broadcast. This was one of the important factors in our decision. The series ended on NBC in the fall of 1971, when the prime-time access rule went into effect. It has since been distributed in syndication, apparently quite successfully, with broadcast in about 40 of the top 50 markets. Mutual claims that it now has a larger audience than when it was on NBC, according to Nielson survey data reaching a high in November 1972 of 14,390,000 homes or over 31 million viewers (with a regular current audience of over 28 million).

[3] *In re Campbell Soup Company*, 35 FCC 2d 758 (June 1972).

in essence on what the Commission thinks is a worthwhile program.

5. The other three opposing parties are all vigorous proponents of retention of the rule, and firm enforcement of it, in the over-all Docket 19622 proceeding.[4] They join in the CBS argument mentioned above, that this kind of *ad hoc* consideration of individual programs more or less inevitably involves a judgment as to what is a "meritorious" or "worthwhile" program. *Westinghouse* urges that, with both the prime time rule generally and this specific area of it under consideration in that over-all proceeding with decision expected this spring, action in this matter alone would "fragment the Commission's over-all review of the access rule, in particular the off-network "restrictions of the rule", and possibly pre-judge some of the important issues. *Metromedia* urges the same points, also noting that: (1) denial of waiver (or failure to grant it) does not mean that Wild Kingdom cannot be presented; stations can present it in non-prime time (some of which is even better for children's viewing) or by preempting network prime-time programs; (2) many of the parties commenting in Docket 19622, on both sides of the basic question concerning the rule, expressed opposition to this type of *ad hoc* approach (including *inter alios* NBC, opposing the rule, and ABC, supporting it, as well as the four parties mentioned here), and indeed the Commission itself has recognized the problems presented both in statements by Commissioners in decisions[5] and in adopting the present procedure under which public notice of such requests is given and in the absence of "special circumstances" they will not be acted on until decision in the over-all proceeding;[6] (3) Commission grant of waiver for off-network programs of "quality" acts as a deterrent to the production of *new* "quality" programming. *NAITP* makes much the same arguments, asserting also that the original *Wild Kingdom* waiver was wrong, and that experience since has demonstrated that waiver breeds a proliferation of similar requests, and would do so in the future if this were granted, all to the detriment of the public and independent producers who have heavily invested in production on the supposition that off-network material would be barred from the access period just as network programs are.

6. In reply to these oppositions, Mutual of Omaha claims that favorable action on its waiver request does *not* involve a judgment as to program "quality or merit", as the Commission recognized in its first *Wild Kingdom* decision, which was based rather on the *independently*

[4] NAITP refers to its lengthy comments in Docket 19622, and Metromedia incorporates its comments therein by reference here if the Commission believes it appropriate to decide the *Wild Kingdom* matter in advance of the over-all decision. CBS also refers to portions of its Docket 19622 comments, and also to its opposition to the earlier Children's Television Workshop waiver request, which was noted in the decision on that matter.

[5] Metromedia cites Chairman Burch's dissent in the *Campbell Soup* (Lassie) decision, footnote 3, above; former Commissioner Bartley expressed the same view in dissenting to the Commission's grant of waiver for the *Six Wives of Henry VIII* program series (*Time-Life* Films, 35 FCC 2d 773, 775, June 1972).

[6] A tighter policy with respect to general requests for waiver of the "off-network" provisions of the rule was adopted in November 1972, in decisions on reconsideration concerning the *National Geographic* and *Six Wives of Henry VIII programs; see Storer Broadcasting Company*, 37 FCC 2d 933, 936, and *Time-Life Films*, 25 R.R. 2d 793. In the latter decision, we set forth the procedure which will prevail in connection with such requests—giving public notice thereof, and opportunity for interested parties to comment and petitioner to reply—and adoption, pending resolution of the over-all proceeding, of a "general policy of not granting waivers of this sort, unless there is a showing of special circumstances which make an earlier decision appropriate and in the public interest." See 25 R.R. 2d 803.

produced and controlled nature of the material. It states that it now proposes to present in the 1973–74 series—in addition to the 12 new programs proposed and contemplated—at least six programs which will not be "off-network" but repeats of 1971–72 and 1972–73 material, thus increasing by 50% of the amount of the series which will not be off-network, as compared to the arrangement for this year. It is urged that this process will continue so that less and less material will be "off-NBC" as time elapses; and that this whole process should be encouraged, for independent producers generally, by waiver.

7. In response to the opposing arguments mentioned, Mutual asserts that its opponents are motivated by extraneous considerations—CBS by a desire to see the rule repealed and thus opposing grant of any waiver which might dilute its arguments and affect that objective, and Metromedia and NAITP by desire to retain prime time for access by independent producers (Metromedia Producers Corporation and NAITP members) without the powerful competition which *Wild Kingdom* provides to the product they would like to sell for use during these hours. It also accuses two opponents of inconsistencies—CBS in emphasizing the importance of *licensee choice* in programming and at the same time urging a return to a system whereby the licensee automatically plugs into the network for all of its prime-time material, and Metromedia is supporting the prime-time access rule as furthering program diversity and at the same time opposing any Commission judgment as to the value of a particular program.[7] With respect to other arguments made, Mutual claims that all it seeks is *continuation* of a waiver which the Commission found to be in the public interest and to have, at most, minimal impact on developments under the rule, grant of which will not preclude appropriate consideration of the rule, its operation and its future. It is claimed that if decision on the request must await the outcome of that proceeding, it will come too late—just before the start of the next season—for Mutual to secure the necessary prime-time clearances for next year; such a course, it is claimed, would be "tantamount to a denial."

Comments in Docket 19622 Incorporated by Parties Herein

8. As mentioned in footnote 4, above, three of the parties opposing waiver incorporated by reference all or part of their comments in Docket 19622. The CBS material so referenced is an expansion of its argument herein mentioned above, that Commission judgments based on the "quality" or "merit" of a program are inappropriate and likely illegal. This is said to be true both with respect to waiver or relaxation of the "off-network" restrictions of the rule (the way to avoid the problems is simply to repeal the rule), and the suggestion in the Inquiry part of the proceeding that certain types of programs might be encouraged, either by requiring their presentation during part of access time, or encouraging them by an exemption to the three-hour limitation. It is said that the Commission should be *neutral* as among program types, and it is noted that in the 1960 Program Policy State-

[7] It is also claimed that Metromedia is inconsistent in urging generally the importance of prime time for syndicated material, but denying its importance with respect to *Wild Kingdom*.

ment we specifically refused to impose such requirements, as inconsistent with the First Amendment.

9. The Docket 19622 comments by Metromedia and NAITP are long and vigorous expressions of support for the prime time access rule (including its "off-network" restriction), and for vigorous enforcement thereof, as against either waiver or over-all relaxation. They emphasize certain objectives of the rule—to open prime time so as to provide a viable base for *sources of new non-network material* as well as to cut back network dominance and control over TV programming—and therefore the importance of avoiding impingement on prime time by waiver or relaxation to permit off-network material to be shown. Like CBS, both assert the impropriety of Commission actions based on its judgment as to the "quality", "worth-whileness" etc., of a program; but they reach the opposite conclusion: that the rule should be maintained strictly, with no waivers. Metromedia asserts that the development of the independent program industry requires stability, not the prospect of waivers.

10. NAITP devotes a good portion of its almost 200-page comments to discussing various aspects of the "off-network waiver" subject, including the asserted invalidity of any possible standards of evaluating "quality" (such as "fact v. fiction", audience acceptance, cost of production, critical acclaim and using network programs as a yardstick), the impropriety of considering favorably virtually any waiver request (since it involves automatically an impingement on prime access time and is not necessary to the presentation of any given program, which can be shown outside of these hours), and the importance of the off-network restriction and of maintaining it so as to provide a base for the development of alternative program sources and prevent continued network dominance of prime time through use of off-network material. It is asserted that there is plenty of new material around so that waiver is not needed from a programming standpoint. NAITP claims that a waiver could conceivably be justified only if it could be found that the program for which it is sought is more "worthwhile" than whatever would be presented in the absence of waiver, and this means that practically never is waiver justifiable when sought by the distributor of the program, since it should have to show that it is better than anything which a station could *conceivably* present, in the absence of waiver. If an off-network program is so really worthwhile, it is argued, the Commission should bite the bullet and order the networks themselves to show it again, leaving untouched the access period, with respect to which program "quality" in any specific sense is irrelevant. It is also claimed that there is a substantial inequity in any waiver involving large-scale use of off-network material in a series; "* * * the independent who produces a new series is barred at the outset from equal competition with his fellow who bought up a package of supposedly impermissible shows for which he is promised a waiver." Specifically, if *Audubon Wildlife Theatre*, the same general type of program series as *Wild Kingdom*, can produce 52 new shows a year, why should Mutual of Omaha be permitted to get by with 12 new and 40 off-network? In sum, grant of "off-network" waivers such as *Wild Kingdom* is both inequitable and highly

discouraging to the independent production of new material which it was one of the chief objects of the rule to promote.[8]

DISCUSSION AND CONCLUSIONS

11. After careful consideration of the material set forth and summarized above, we conclude that waiver for the *Wild Kingdom* program series—with the request modified in the reply to oppositions as noted above—is warranted, and that such decision should be reached at this time, even though Docket 19622 is still pending. The basic reason why we reach this conclusion is that what is involved here is simply a *continuation* of a waiver previously granted, not an action relating to a new program; and therefore we are simply acting in a way which preserves the *status quo*, pending complete review and decision based on the entire body of material filed in the over-all proceeding. With respect to the timing of this action, we agree with Mutual of Omaha that unless favorable action is forthcoming now, distribution of this year-long series for use by stations at a desirable time might well be foreclosed for this coming season. Without necessarily accepting entirely the contention that failure to act now would be "tantamount to denial", we recognize that stations are well into, if they have not already completed, the planning of their schedules for the coming year, 1973–74; and that the weeks immediately after the NAB convention, or roughly the month of April, are of considerable importance in this respect. Since it does not now appear that a decision in the over-all proceeding can be forthcoming before late April, decision in this matter now therefore appears appropriate.

12. In reaching these conclusions as to the timeliness of acting now on the request, and as to its merits, we have taken into account the arguments of the opposing parties summarized above, in both of these areas. With respect to the propriety of action at this time, we agree with Mutual of Omaha that there is nothing in favorable action at this time which affects the outcome of our over-all consideration of the rule, either through passing judgment on the various contentions made in the comments or by permitting such an encroachment into access time that the rule is, in effect, repealed or at least rendered considerably less effective in light of its purposes. The arguments mentioned concerning the general nature of these "off-network" waiver requests—as representing Commission judgments of an impermissible character, as frustrating one of the key objectives of the rule, etc.—will receive careful attention in our consideration in the general proceeding with respect to the future. While not necessarily completely persuasive or determinative, these contentions do deserve our careful attention with respect to a course of action for the future, and they will receive it. But to give them decisional weight here, with respect to the present decision *continuing* a waiver and the adoption of it at this time, would be inappropriate. For one thing, it would be to ignore a number of other comments in the proceeding, including some by parties favoring retention of the basic rule limit-

[8] We have not attempted here to cover all of the points urged in the NAITP filing. The foregoing summary is sufficient for present purposes.

ing network programs, to the effect that we should eliminate the "off-network" restriction even though keeping the basic rule.[9]

13. To a considerable degree, of course, these arguments represent a view that our original *Wild Kingdom* waiver action was wrong, or, at least, that it was one which should not have been taken in light of the later developments and problems which arose. We do not agree with this view in any sense pertinent here, i.e., that the decision of last February was so erroneous that the resulting distribution arrangement should now be terminated. We point out, as we did earlier, the principal bases on which the decision was reached: (1) that the *Wild Kingdom* material was conceived and produced independently, with the network not having a voice in its production or any interest in it except the right to network exhibition (and not even that during the last few years of its network run, when it was sponsor-owned); and (2) the fact that new material would be added (12 new programs a year). See *Mutual Insurance Company of Omaha*, 33 FCC 2d 583, 585 (par. 6). The fact that the material was of *independent* origin means that the shadow of "network control", emphasized by NAITP, does not hang over it to any significant extent when it is presented as a syndicated program, with respect to which stations who decided to buy it are exercising their free choice as licensees. Its use does, of course, impinge on the availability of prime time to non-network sources of entirely new material; but we concluded in the earlier decision (par. 7) that this was minor.[10] It appears to be true now, as it was then, that waiver is necessary to the continued presentation of the program, access to "prime time" being important to it just as it is to first-run syndicated material generally.

14. In reaching this decision, we have taken into account also the fact that there are two other pending requests for waiver of the rule before us, for a network to present at 7:30 weekly a children's program to be produced by Children's Television Network (CTW), and one for waiver of the "off-network" restriction to permit use in access time next year of the *America* series now on NBC but to be distributed hereafter in syndication. We have recently stated that action on the CTW request must be deferred until the over-all Docket 19622 decision; and the same conclusion may be appropriate as to *America*. We realize that in granting *Wild Kingdom* now, we are treating differently one request from another, and, since conceivably all of the programs might be regarded as competing for access time, it could be argued that we are acting in a discriminatory fashion. However, as we see it, a much more important fact decisionally is that in the present case we are merely acting to continue a waiver and preserve the status quo, whereas the other two involve *additional waivers for*

[9] In other words, failure to act at this time, in view of the importance of action now with respect to the distribution of the program during 1973–74 could be regarded as a form of negative "pre-judgment".

[10] The amount of time which this program would use, if shown on affiliated stations in all 50 markets, would be a half-hour per week, or less than 2.5% of the 42 half-hours per week of "access-time" available in each market under the rule. As NAITP points out, there is another possible impact: the discouraging effect on independent producers, particularly of the same kind of material, but this does not seem to have been a factor so far, since "nature" and "outdoor" programs are one program category which has increased in access time under the rule.

new programs—an action whose propriety is open to question while the general subject of the rule and the "off-network" restriction are pending. As mentioned in the *CTW* decision, this action is subject to review if it appears that the over-all decision will not be reached by mid-May.[11]

15. As noted in paragraph 5 and footnote 6, above, last fall the Commission adopted a tighter policy with respect to general requests for waiver of the "off-network" restrictions of the rule, under which public notice thereof is given and opportunity for comment is afforded. We stated at that time that in general such waivers would not be granted ahead of the over-all decision in Docket 19622, "unless there is a showing of special circumstances which make an earlier decision appropriate and in the public interest". We find such special circumstances to be present in this case: the "independent" character of the program even when it was on the network, the fact that something new is added to the program series (meaning continuing production activity), the fact that decision now appears likely a matter of necessity if the *Wild Kingdom* program is to be distributed to stations this fall, and, most of all, the fact that this is a *continuing*, rather than a *new*, waiver, which does nothing more than preserve the status quo. Therefore we are granting waiver for this series for the 1973–74 year (except for the unlikely development that some pertinent aspects of the Docket 19622 decision may become effective before then), provided that at least 12 of the programs in the series are new to television, and (as suggested by Mutual in its reply to oppositions) that at least another 6 are material which is not "off-NBC".

16. This waiver, of course, is subject to the outcome of the over-all proceeding, Docket 19622. Decision in that proceeding is expected by early or mid-May. However, a number of parties, on both sides of the basic question as to the merits of the rule, have urged that major changes in it, or repeal of it, cannot well be made effective before the 1974–75 season. Without here deciding this point completely, we find it unlikely that any change having substantial significance in the present connection will be effective before some time in September 1974; so that this condition is probably of no importance as far as this coming year is concerned. It might well mean no further waivers after this coming year; but Mutual has indicated that waiver will become less and less important with time, as it accumulates a greater amount of material from 1971–72 and later, which is not "off-NBC".

17. In view of the foregoing, IT IS ORDERED, That during the year ending September 30, 1974, subject to any changes which may be required or appropriate as a result of the over-all decision in Docket 19622, network-affiliated or network-owned stations in the top 50 markets MAY PRESENT, without counting against the permissible material under Sections 73.658(k)(1) and 73.658(k)(3), the *Wild King-*

[11] The reason for our differing treatment is that stated in the text. We also note another possible difference among the situations. Since *Wild Kingdom* is a year-long series, we assume it must obtain clearance at the beginning of the year if it is to be shown in 1973–74 at all. This is not necessarily true to the same degree of *America*, which is only 13 weeks and whose presentation later in the year, say after January, might be possible even if it does not obtain time this fall. As to the CTW request, it does not appear that this is geared to a "broadcast year"; CTW planned to start production very soon so as to start broadcasting in January 1974, if waiver were granted.

dom program series, provided that the individual programs presented during that period include at least 12 which are new to television and at least 6 more which are not off-network.

FEDERAL COMMUNICATIONS COMMISSION,
BEN WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER H. REX LEE

Mutual Insurance Company of Omaha has petitioned for continued waiver of the off-network provisions of the "Prime Time Access Rule" (Section 73.658(k)(3)) for its *Wild Kingdom* program series for the 1973–74 broadcast year. The waiver granted by the Commission last year (33 FCC 2d 583, 23 RR 2d 736) permitted network-affiliated stations in the top 50 markets to present during the cleared portion of prime time the *Wild Kingdom* series, including material formerly presented on the NBC television network, provided that 12 new episodes were added to the earlier material. Mutual's present request originally sought continuation of the waiver on the same basis, but it was subsequently modified so that Mutual would include, in addition to 12 new programs, at least six episodes from those that were produced during the 1971–72 and 1972–73 seasons (which are not off-network programs). In effect, Mutual's amended proposal would mean that at least 18 of 52 planned programs for syndication would be new or not off-network. Public notice of the filing of Mutual's waiver request was given by the Commission, and, in response thereto, four parties—Columbia Broadcasting System, Inc.; National Association of Independent Television Producers, Inc.; Metromedia Producers Corp.; and Westinghouse Broadcasting Company, Inc.—filed comments in opposition to the petition.

The majority grants Mutual's request for continuation of the *Wild Kingdom* waiver on the theory that such action represents no more than the maintenance of the *status quo*, pending final disposition of the Commission's inquiry in Docket No. 19622 into the effect and operation of the "Prime Time Access Rule." See *Notice of Inquiry and Notice of Proposed Rule Making*, 37 FCC 2d 900 (1972). Moreover, the majority agrees with Mutual's assertions that unless favorable action is forthcoming now, distribution of the year-long program series may be foreclosed for the coming season and that continuation of the *Wild Kingdom* waiver will not affect the Commission's overall consideration of Section 73.658(k)(3), either through prejudgment of the contentions made in Docket No. 19622 or through encroachment into access time. The majority does not concede that the original waiver ruling was so erroneous that the resulting distribution arrangement should now be terminated—it points to the principal reasons for its earlier decision, which indicate that this program series is not tainted by "network control." It also attempts to distinguish this case from the waiver request of the Children's Television Workshop, action on which was recently deferred by the Commission until the Docket No. 19622 decision, on the basis that the *Wild Kingdom* waiver represents only the preservation of the *status quo* whereas the CTW request (and the pending request on behalf of the *America* program series now on NBC) involve additional waivers for new programs. As a result, the

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majority finds that "special circumstances" exist to justify waiver here, *i.e.*, the "independent" character of the program series, the addition of new material to the series, the need for early action to permit syndicated distribution in the fall and the continuing nature of the waiver itself.

I must dissent to the majority's action, which I consider to be particularly ill-advised at this time. The "Prime Time Access Rule" is now the subject of a pending proceeding which specifically includes an inquiry into what approach should be followed by the Commission in dealing with off-network waiver requests as well as whether the various waiver decisions reached in 1972, including the *Wild Kingdom* action, were correct. Apparently, many parties in the Docket No. 19622 proceeding have urged the Commission to reject any approach whereby waiver decisions are based on the nature or particular merit of program series, and while such views may not necessarily be determinative, they cannot be taken lightly. The real point is that the questions involved here are not easily answered and do not lend themselves well to consideration in the context of a single waiver request. Moreover, since any decision to continue an existing waiver or to grant a new one could seriously prejudice our resolution of the basic issues in the *Inquiry* proceeding, requests like Mutual's should be held in abeyance pending decision in Docket No. 19622. Deferring action on waiver requests would avoid the undesirable and unfair consequences of choosing among competing requests on an *ad hoc* basis and would eliminate the discriminatory approach in preferring those program series that had obtained waivers in the past to the detriment of projected series such as that proposed by CTW.

While it may be true that the surrounding circumstances have not changed since the earlier *Wild Kingdom* waiver action, the fact is that there has been fairly widespread criticism of the Commission's rulings in the prime time access area, and, for that very reason, we instituted a proceeding to explore more orderly and objective ways of dealing with such situations. Moreover, our concern led to the adoption of tighter processing procedures with respect to requests for waiver of the off-network provisions of the "Prime Time Access Rule," which contemplated a general policy against the grant of such waivers prior to the resolution of Docket No. 19622. Contrary to the majority's position, I cannot find the "independent" character of the *Wild Kingdom* material to be dispositive—I believe that the same has been true of all other program series for which waiver has been sought. Therefore, this fact alone does not warrant special treatment, especially since similar arguments can be made by others like CTW. I also cannot agree that postponement of a ruling on the Mutual request pending final decision in the *Inquiry* proceeding is tantamount to denial. Our resolution of Docket No. 19622 should be accomplished soon and, in any event, well before the current waiver expires in October. It does not appear likely that Mutual will be unable to obtain access to prime time in the top 50 markets if the Commission decision is released in the next few months.

In addition, I am unable to accept the majority's rationale that favorable action is warranted here since it merely represents the continuation of an existing waiver and the maintenance of the *status quo*.

Since the "Prime Time Access Rule" is now in full force and effect today and since the original *Wild Kingdom* waiver was limited in duration to the 1972–73 broadcast year, the *status quo* should be interpreted to mean enforcement of the rule's provisions, especially since we are engaged in a review of the effect and operation of Section 73.658(k). Any other approach effectively thwarts the basic purposes of the rule—to lessen the high degree of network domination of station operation and to provide a healthy impetus to the development of new program sources and ideas. Moreover, if the majority was really concerned with the maintenance of the *status quo* in these circumstances, it would restrict Mutual's ability to expand distribution of its program series to those top 50 markets which are not currently carrying *Wild Kingdom*, estimated to be about ten such television markets.

F.C.C. 73R–110

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WILLIAM P. JOHNSON AND HOLLIS B. JOHNSON, D.B.A. RADIO CARROLLTON, CARROLLTON, GA. For Construction Permit	Docket No. 19636 File No. BP–17970
FAULKNER RADIO, INC. (WLBB), CARROLLTON, GA. For Renewal of License	Docket No. 19637 File No. BR–1431

MEMORANDUM OPINION AND ORDER

(Adopted March 12, 1973; Released March 14, 1973)

BY THE REVIEW BOARD:

1. The above-captioned applications were designated for consolidated hearing by Commission Memorandum Opinion and Order, FCC 72–1022, 38 FCC 2d 68, released November 21, 1972. The only issues designated with respect to the application of Faulkner Radio, Inc. (Faulkner) for renewal of its license for Station WLBB, Carrollton, Georgia, are abuse of process and misrepresentation issues.[1] Now before the Review Board is a petition to enlarge issues, filed by Faulkner on December 11, 1972, seeking the addition of a meritorious programming issue.[2]

2. Faulkner contends that a meritorious programming issue is necessary in order to enable it to adduce evidence as to the past broadcast record of Station WLBB. In the past, the Commission and the Review Board have permitted the adduction of evidence of a station's meritorious program record where issues have been designated with relation to the operation of the station. See *e.g. Friendly Broadcasting Co.*, 35 FCC 2d 611, 24 RR 2d 712 (1972). However, the Board agrees with the Broadcast Bureau that in this case the only issues designated against Faulkner are character-type issues which do not relate in any way to the operation of the station.[3] Because the designated issues in the instant proceeding do not flow from the station's operational practices, the station's record is irrelevant; therefore, no useful purpose would be served by specifying the requested issue. *Cf. Action Radio, Inc.*, 38 FCC 2d 489, 25 RR 2d 1174 (1972); *KFPW Broadcasting Co.*,

[1] These issues were designated as a result of conflicting affidavits furnished to the Commission by Hollis B. Johnson, a Radio Carrollton principal, and Robert M. Thornburn, vice-president of Faulkner. The Commission stated that the affidavits raised questions as to whether Faulkner filed a petition to deny Radio Carrollton's application for the purpose of delaying its processing and whether Faulkner made misrepresentations in the petition.

[2] Also before the Board are the Broadcast Bureau's opposition, filed December 27, 1972; and Faulkner's reply thereto, filed January 15, 1973.

[3] See note 1, *supra*.

33 FCC 2d 313, 23 RR 2d 515 (1972); and *Western Communications, Inc.* (*KORK-TV*), 38 FCC 2d 974, 26 RR 2d 364 (1973).

3. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed December 11, 1972, by Faulkner Radio, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-279

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re SAPULPA CABLE TELEVISION, SAPULPA, OKLA. For Certificate of Compliance	CAC-355 OKO74

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1973; Released March 14, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. In *Sapulpa Cable Television*, FCC 72-1106, 38 FCC 2d 584, the Commission denied the above-captioned application for Certificate of Compliance because the Sapulpa franchise granted April 3, 1972, provided for a 4% to 6% franchise fee and contained no showing that this fee was reasonable as required by Section 76.31(b) of the Commission's Rules.[1]

2. By "Petition for Reconsideration" and an amendment thereto filed respectively January 11, and January 22, 1973, Sapulpa Cable petitioned the Commission to grant the subject application and submitted an amendment to the Sapulpa franchise showing that the City of Sapulpa has reduced its franchise fee to 3% effective January 15, 1973. With this amendment, the sole objection to the proposal has been resolved.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition For Reconsideration" and the "Amendment to Petition for Reconsideration" filed January 11, 1973 and January 22, 1973, respectively, ARE GRANTED.[2]

IT IS FURTHER ORDERED, That Sapulpa Cable Television's application (CAC-355) IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[1] Section 76.31(b) provides:
The franchise fee shall be reasonable (e.g., in the range of 3-5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). If the franchise fee exceeds three percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings, by the franchisee that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and by the franchising authority, that it is appropriate in light of the planned local regulatory program. The provisions of this paragraph shall not be effective with respect to a cable television system that was in operation prior to March 31, 1972 until the end of its current franchise period, or March 31, 1977, whichever occurs first.

[2] We emphasize that cable systems seeking reconsideration of their application denials should demonstrate why they could not originally conform with our regulations. Where we determine that a system could have conformed in its initial application but did not do so until after its application was denied, we reserve the right to treat its petition for reconsideration like an original application in terms of public notice, service, and the other requirements of Sections 76.11 and 76.13 of the Rules.

F.C.C. 73-264

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606 TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS. (VALLEJO-FAIRFIELD AND SACRAMENTO, CALIF.)	Docket No. 19511 RM-1839, 1948
Application for Extension of Time to Complete Construction of Station KMUV-TV, Sacramento, Calif.	File No. BMPCT-7386

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1973; Released March 13, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. The Commission has before it for consideration a pleading filed on October 6, 1972 by Camellia City Telecasters, Inc. (Camellia), licensee of station KTXL(TV), Sacramento, California. The pleading was entitled "Petition to Deny" and was directed against engineering data filed by Grayson Television Company, Inc. (GTC), (the permittee on channel 31 (KMUV-TV) in Sacramento, California) in response to paragraph 6 and the ordering clause modifying the KMUV-TV construction permit of the *First Report and Order* (37 FCC 2d 251, released September 19, 1972) in the above-captioned proceeding, and against GTC's application for extension of time to complete construction of station KMUV-TV (BMPCT-7386). GTC filed a motion to strike the Camellia pleading and also a letter to the Chief, Complaints and Compliance Division, responding to certain allegations of misrepresentations and concealment contained in the Camellia pleading. Camellia filed a reply to the GTC motion to strike and also a letter to the Chief, Complaints and Compliance Division, in response to the GTC letter, and, finally, GTC filed a reply to the opposition to the motion to strike.

2. By the *First Report and Order*, *supra*, the Commission, among other things, assigned channel 31 to Sacramento, California, and modified the outstanding construction permit of GTC for the construction of station KMUV-TV on channel 15 to specify operation of channel 31 in lieu of channel 15, "on the condition that permittee shall submit to the Commission all necessary information to comply with the applicable technical rules for modification of authorization to cover the construction of station KMUV-TV on channel 31 at Sacramento, California." In the Notice of Proposed Rule Making in

Docket No. 19511, the Commission had noted that GTC had filed an application for a modified construction permit but that "* * * A broadcast operation on channel 15 in Sacramento will not be permitted because * * * operation at the newly specified site will result in an increase in the operating limits on the use of the channels by the land mobile services." The Commission stated further that "* * * The Grayson proposal for use of channel 31 at Sacramento is in technical compliance with the Commission's minimum spacing requirements and the other technical rules." This latter statement clearly refers to the technical proposal made by GTC in connection with its proposal to substitute channel 31 for channel 15.

3. A petition to deny does not lie against either GTC's application for extension of time to complete construction or the Commission's *First Report and Order*, *supra*, modifying the KMUV–TV construction permit, and the material submitted by GTC in response to that order. See section 1.580(a)(3) of the Commission's rules and section 309(e) and (d)(1) of the Communications Act of 1934. However, Camellia is the licensee of a competing television station in Sacramento, and was a party to the captioned rule-making proceeding. Since the "Petition to Deny" was timely filed with respect to that proceeding, we will treat it as a petition for reconsideration of that part of the *First Report and Order* which modified KMUV–TV's construction permit. *FCC* v. *Sanders Brothers*, 309 U.S. 470, 9 RR 7008 (1940). Inasmuch as its petition does not lie against the KMUV–TV extension application, it will be dismissed. In any event, Camellia raises no matters of substance against the extension application.

4. Camellia contends that the engineering data for a channel 31 operation filed in response to the *First Report and Order*, *supra*, constitutes an application for a major change in the facilities of station KMUV–TV within the meaning of section 1.572(a)(1) of the Commission's rules and is therefore subject to all the statutory provisions and procedural rules for major changes including the provisions of section 309(d)(1) of the Act which provide that parties in interest may file petitions to deny such applications. Camellia argues, further, that the only change in GTC's outstanding permit authorized by the *First Report and Order*, *supra*, was a channel change from channel 15 to channel 31, and that there was no authorization for a change in facilities other than the channel change, even though the channel change was predicated on the necessity to seek a more suitable transmitter site. Camellia claims that the data filed by GTC makes substantial additional changes that includes a transmitter site location change from approximately 32 miles due east of Sacramento to approximately 24 miles south and a little west of Sacramento, changes in aural and visual ERP and a 93.6% change in the area of the KMUV–TV Grade B contour. Thus, it contends that a complete application, accompanied by the appropriate fee, must be filed, including financial data, ascertainment and equal employment data, and also that publication requirements for such an application must be met.

5. In addition to the foregoing objections to the form and procedure followed by GTC in responding to the Commission's modification

order, Camellia also alleges that GTC has misrepresented and concealed certain matters, which, it contends, raises questions about GTC's qualifications to be a broadcast licensee, and requires designation of the matter for evidentiary hearing. Specifically, Camellia alleges that in the application for assignment of the construction permit for KMUV–TV to GTC, GTC represented that Sidney A. Grayson would not be a stockholder, officer or director of GTC and that he would not participate in the management of the station; that GTC, in a filing with the Department of Corporations, State of California, on August 17, 1971, while the assignment application was pending, listed Sidney A. Grayson as a vice-president, director, general manager and chief operating officer of the company; that articles appeared in area newspapers indicating that GTC had permitted Sidney A. Grayson to hold himself out to the public and the press as the principal force behind KMUV–TV; and that, although GTC did report employment of Sidney A. Grayson as general manager in an ownership report, which Camellia claims was inadequate notification, it in no way suggested that he would be the chief operating officer of the corporation. Subsequently, in its "Reply to Motion to Strike Petition to Deny," Camellia alleged, further that a teletype message from the San Francisco office of Dun and Bradstreet indicated that as of June 1, 1972, its records showed Sidney A. Grayson as president of GTC; that additional newspaper articles referred to him as president of GTC; and that a GTC letterhead on a letter written by Sidney A. Grayson bearing the date September 27, 1972, identified Mr. Grayson as vice-president and general manager.

6. In response to these various allegations, GTC alleges that Mr. Grayson resigned as president and a member of the board on January 5, 1970, six months prior to the filing of the assignment application; that after the Commission granted the assignment application and the assignment was consummated, GTC decided that Mr. Grayson's expertise was essential and that its Washington counsel discussed his employment as general manager with "responsible staff members of the Commission" and that "no objections were voiced" as to his employment; and that, thereafter, on January 12, 1971, Mr. Grayson was hired as general manager at a salary of $25,000 per year. GTC concedes that a mistake was made and that Mr. Grayson was erroneously listed in the securities application filed with the California Department of Corporations in the manner alleged by Camellia, and states that this error has since been corrected by amendment.

7. With respect to the various newspaper stories, GTC argues that neither it nor Mr. Grayson can control newspaper reports or "inconsistencies or inaccuracies" contained therein. In addition, it submits letters from reporters who wrote stories concerning KMUV–TV for the *Sacramento Bee* and the *Sacramento Union* admitting that identification of Mr. Grayson as president of GTC was in error, and apologizing therefor. As to the alleged teletype message from Dun and Bradstreet, GTC has submitted an affidavit from Dun and Bradstreet stating that it had neither prepared nor transmitted such message, and that its information on GTC shows Mr. Grayson only as general man-

ager. GTC also alleges that Camellia had in fact received the true facts from Dun and Bradstreet on October 27, 1972, and that the teletype incident was a "total fraud" prepared and sent by Camellia to itself. Finally, with respect to the letterhead stationery, GTC admits that such stationery was used. It states, however, that the stationery was erroneously prepared by the manufacturer and was used only because the error was not considered to be of such significance as to warrant destruction of the writing paper. GTC points out, further, that it has since undertaken to purchase accurate letterhead stationery and that Mr. Grayson has since been identified several times as only general manager of KMUV–TV, e.g., he signed a rental agreement in February 1972, as general manager, and he was listed in *Broadcasting* on March 15, 1971, as having been appointed general manager.

8. It does not appear from the pleadings that Camellia challenges the legal authority of the Commission to modify the KMUV–TV construction permit in the manner urged by GTC. It argues only that the Commission did not intend to do so, and that, therefore, GTC should have filed an application to cover the changes other than the change from channel 15 to 31. However, the Commission's consideration of GTC's petition for rule making to assign channel 31 to Sacramento and its request for an order to show cause why the GTC construction permit for channel 15 should not be modified for operation on channel 31 at a new site with different facilities specified the exact engineering data regarding the proposed channel 31 operation. Everyone, including Camellia, was on notice of the technical details of the GTC proposal for operation of station KMUV–TV. Camellia did not object to the Grayson proposal. An order to show cause under section 316 of the Communications Act on the channel change was not required, because GTC itself proposed the modification, and thus acquiesced. GTC has complied with the modification order by filing the engineering data for operation at the new site and with the new facilities. From a reading of the *Notice of Proposed Rule Making* and the *First Report and Order* in this proceeding it is clear that the proposed channel change and the modification of construction permit were based on Grayson's proposal for the channel change and its request for an order to show cause (which was not required for the reasons stated above) filed on July 6, 1972. It is equally obvious that the reason for the proceeding was to make it possible for GTC to construct a UHF television station in the manner it proposed in its earlier modification application without adversely affecting the Commission's planned land mobile use in San Francisco.

9. In view of the foregoing, there should have been no doubt that the Commission intended in the *First Report and Order* in this proceeding to modify the construction permit of KMUV–TV to permit not only the change of channel from 15 to 31, but also to encompass the other changes proposed by KMUV–TV in its earlier modification application. Since Camellia has raised the issue, however, we will take the opportunity to clarify that order here. Based on the record in this docket proceeding, the Commission modified the construction permit of KMUV–TV to change frequency (channel 15 to channel

31) at the site and with the facilities specified in the petition for rule making. Therefore, the engineering data submitted by GTC was properly submitted in response to the modification order and does not constitute an application for major changes in the facilities of station KMUV–TV, but is just the technical data supplied to permit issuance of the modified permit. Although Camellia has not raised the issue, there should be no question concerning the Commission's authority to require modification of a construction permit or license in any manner and to any extent it deems appropriate under section 316 of the Communications Act. Thus, the Commission has, over the years, modified many construction permits and licenses when circumstances required such a result. See *Transcontinent Television Corporation* v. *F.C.C.*, 113 U.S. App. D.C., 308 F. 2d 309 (1962); *Television Assignments New Bern, North Carolina*, 15 RR 1630, 1633. And in many of these cases, as here, the modification ordered, although it specified only a change in frequency, encompassed other changes, such as change in transmitter location, height above average terrain, power, etc., by the simple expedient employed here; i.e., modification subject to the filing of data by the permittee to permit the issuance of the modified authorization.

10. In addition, as noted above, Camellia has also raised issues of misrepresentation and concealment of material information. The issues seem to be (a) whether the Commission received proper notification of Sidney A. Grayson's appointment as general manager of KMUV–TV, and (b) whether Mr. Grayson is, in fact, more than general manager and has concealed that fact from the Commission. With respect to the matter of notification, it is clear from the pleadings that GTC filed an amended ownership report in which it advised the Commission that Mr. Grayson had been hired as general manager. Since that position is not one of an officer of the corporation, there was no legal obligation on the part of GTC to provide even that notification. Therefore, we conclude that the notification in the manner given does not raise any question of concealment or misrepresentation.

11. As to the question of whether Mr. Grayson is something more than just general manager, we must conclude from the pleadings that Camellia has not proved its allegations, or even raised a substantial or material question of fact. GTC has explained or refuted every charge made by Camellia, and, indeed, raised a question of Camellia's good faith in the case of the Dun and Bradstreet teletype. On the basis of all the information before us, we conclude that there has been no misrepresentation or concealment of material information which would raise any substantial questions of fact requiring an evidentiary hearing on basic qualifications.

12. In view of the foregoing, IT IS ORDERED, That the "Petition to Deny" filed by Camellia City Telecasters, Inc., against the engineering data filed by Grayson Television Company, Inc., in response to the modification order in this proceeding, and against Grayson Television Company's extension of time application (BMPCT–7386), IS DISMISSED;

13. IT IS FURTHER ORDERED, That, considered as a petition for reconsideration of the order in this proceeding modifying Gray-

son Television Company, Inc.'s construction permit, such "Petition to Deny" IS DENIED; and

14. IT IS FURTHER ORDERED, That the modification of the construction permit (BMPCT–7313) of Grayson Television Company, Inc., to operate on channel 31 at Sacramento, California, at the site and with the facilities specified in its petition for rule making and in the engineering data subsequently supplied in response to the *First Report and Order* herein, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-294

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WSBC BROADCASTING CO., CHICAGO, ILL. For Construction Permit To Remove Antenna Series Limiting Resistor	File No. BP-19308

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 20, 1973)

BY THE COMMISSION:

1. We have for consideration the above-captioned application for construction permit authorizing the removal of a 10-ohm series limiting resistor; a staff action of November 20, 1972, granting the application; a petition for reconsideration and stay of staff action filed December 20, 1972, by Consolidated Broadcasting Corporation, licensee of radio station WEMP, Milwaukee, Wisconsin; and all responsive and associated pleadings.

2. Radio station WSBC is a Class IV outlet operating on a local channel (1240 kHz, 1 kW day, 250 watts night); WEMP is a regional (Class III) station assigned to 1250 kHz (5 kW, DA-2, unlimited time). The petitioner (WEMP) alleges that it will sustain new adjacent channel interference if WSBC is operated without the resistor, as contemplated by the grant of the above-captioned application.

3. In authorizing removal of the WSBC resistor, the staff found that the resulting antenna efficiency (170 mV/m in place of 150 mV/m) would still be lower than the measured efficiency of WSBC's former roof-top antenna system and that, even taking into account WSBC's subsequent site change in the direction of Milwaukee (granted in 1970; BP-18794), the net increase in radiation toward WEMP would be so slight as to result in no measurable increase in interference.

4. The pleadings before us are in conflict with respect to the inverse field presently generated by WSBC. These differences stem from deficiencies in the measurement data submitted by both parties. Of particular concern is the credibility of WSBC's contention that its present antenna efficiency is less than from the former roof-top site, despite its present use of a higher, skirted radiator with a superior ground system. The problem is complicated by the fact that the old site no longer exists; the comparative measurement data offered by WSBC therefore cannot be confirmed. A further complication is presented by the scattering effects normally encountered when conducting a field intensity survey in a large city like Chicago.

5. In an unreported Memorandum Opinion and Order adopted September 30, 1970 (*In re KPAL Broadcasting Corporation*, FCC 70-1064), we considered a Class IV transmitter site change which

resulted in substantial new overlap of prohibited contours, in violation of section 73.37(a) of the rules. In that case, we found that if KPAL were a new applicant seeking a 250-watt operation at the proposed site, there would be no overlap of pertinent contours with any existing station, and that in accordance with section 73.37(d) of the rules and our policy of encouraging Class IV stations to maximize their facilities, KPAL would then be eligible for a power increase to 1 kW. Since the KPAL proposal could have been accomplished by this two-step application procedure, we reasoned that section 73.37(a) should be waived and the application granted, subject to the assertion of hearing rights by any affected station under section 316 of the Communications Act.

6. While *KPAL* involved a site change rather than the removal of a resistor, the end result is the same; i.e., an increase in radiation by a Class IV station creating new contour overlap in violation of section 73.37(a) of the rules. We therefore feel that the rationale of *KPAL* should be dispositive of the case now before us. The difficulty is that the holding in *KPAL* cannot be applied until the location of WSBC's 0.5 mV/m contour under BP–19308 is clearly established. This can be accomplished by taking field intensity measurements with WSBC operating without the resistor at its authorized daytime power of 1 kW. From measurement data thus obtained, the location of the 0.5 mV/m contour produced by a 250-watt operation without the resistor can be calculated. Only in this way can we decide whether a resistor at WSBC is needed and, if so, its appropriate value.

7. Accordingly, IT IS ORDERED, That the staff action of November 20, 1972, granting the above-captioned application, IS SET ASIDE, and the application IS RETURNED TO PENDING STATUS.

8. IT IS FURTHER ORDERED, That, in cooperation with WEMP, WSBC IS DIRECTED to take sufficient daytime field intensity measurements to enable the Commission to determine whether section 73.37(a) would be violated by a 250-watt operation without the resistor and, if so, the value of the resistor necessary to bring such operation into compliance with said rule.

9. IT IS FURTHER ORDERED, That for test purposes and at times agreed upon with WEMP, WSBC MAY OPERATE without the resistor, but at all other times shall operate with the resistor.

10. IT IS FURTHER ORDERED, That the requested measurements SHALL BE MADE AND ANALYZED in accordance with section 73.186 of the Commission's rules, and SHALL BE CERTIFIED by both parties and submitted to the Commission within ninety (90) days.

11. IT IS FURTHER ORDERED, That failure to submit the measurement data within ninety (90) days, or within such additional period of time as the Commission may allow, SHALL RESULT IN DISMISSAL of the above-captioned application and CANCELLATION of the outstanding construction permit.

12. The WEMP petition for reconsideration and stay IS GRANTED to the extent indicated above, and in all other respects IS DENIED.

By Direction of the Commission,
Ben F. Waple, *Secretary.*